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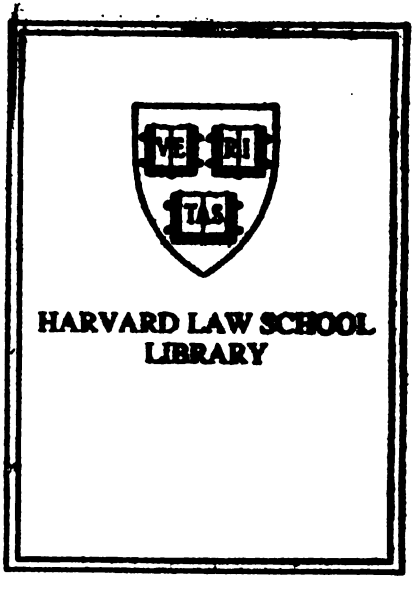

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MINNESOTA REPORTS

VOL. 113

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 9, 1910—FEBRUARY 24, 1911

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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1911

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JUSTICES

OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CHARLES M. START, Chief Justice
Hon. CALVIN L. BROWN
Hon. CHARLES L. LEWIS
Hon. EDWIN A. JAGGARD [1]
Hon. THOMAS D. O'BRIEN [2]
Hon. DAVID F. SIMPSON [3]
Hon. GEORGE L. BUNN [4]

IRVING A. CASWELL, Esq., Clerk

ATTORNEY GENERAL:
Hon. GEORGE T. SIMPSON

[1] Died February 13, 1911.
[2] Term expired January 2, 1911.
[3] Term began January 2, 1911.
[4] Appointed February 17, 1911.

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.

Pursuant to R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion, except where otherwise noted.

With few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in( ). The cases on pages 12, 55, and 510 are from the April, 1910, term calendar. The other cases are from the October, 1910, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

The footnotes in the present volume which are preceded by the word "[Note]" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.

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PROCEEDINGS

IN MEMORY OF

ASSOCIATE JUSTICE JAGGARD.

On the afternoon of April 4, 1911, in the court room at the State Capitol, James D. Shearer, Esq., president of the Minnesota State Bar Association, and chairman of a committee to draft a memorial of Associate Justice Jaggard, addressed the Supreme Court, then in session, and read the following:

MEMORIAL.

Edwin Ames Jaggard was born June 21, 1859, at Altoona, Pennsylvania, and was the son of Clement and Anna Jane (Wright) Jaggard. In 1879 he was graduated from Dickinson College, Carlisle, Pennsylvania. Three years later he secured his degree of Bachelor of Laws from the University of Pennsylvania. He came to Minnesota in 1882 and engaged in active legal practice in the city of St. Paul. In 1898 he was elected a Judge of the District Court of Ramsey county, and served one term on that bench. While a district judge in 1904, he was elected an Associate Justice of this Court and was re-elected at the general election held in November, 1910, remaining a member of this Court until his death. In 1887 he was chosen to succeed the late Senator Cushman K. Davis, as lecturer in the St. Paul Medical College on medical jurisprudence. This college was subsequently merged with the medical department of the University, and he became a member of the faculty of the law department of that institution. He remained an honored and deeply beloved member of this faculty until his death.

He was the author of Jaggard on Torts, a recognized authority

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throughout the country. In recent years he published Jaggard on Taxation in Minnesota and the Dakotas, and Jaggard on Taxation in Iowa. He mastered the intricacies of this technical subject. He was also the author of articles on Malicious Prosecution and False Imprisonment, and the Historical Anomalies in the Law of Libel and Slander.

He was married in 1890 to Anna May Averill, the daughter of General and Mrs. John T. Averill, pioneer residents of Minnesota.

Few judges have been so close to the people. They knew him and loved him as a man. His presence was always a cheer. He was sympathetic and responsive to every human appeal. Endowed with the spirit of unfailing kindness, he was the personification of generosity. He had a genius for companionship. Friendliness was his birthright. A spirit of infinite patience and forbearance tempered his relations with others. He always tried to build—not destroy. He spread the mantle of charity over human failings and shortcomings. Rarely has a man so completely entered into the life of this state. He was a welcome guest at every public gathering. In his addresses, he was both humorous and humanly philosophical. He was ardently fond of outdoor sports. His nature craved the outdoor life. This trait in a judge appealed to the hearts of the people. It broadened his vision and gave him a far-reaching perspective.

He was a scholarly author of wide research. An able judge, of the closest application. He had a brilliant mind, which intuitively turned toward investigation. His method of reasoning was scientific, and his opinions were the result of unflagging industry, whose goal was the complete mastery of every subject.

He had a fatherly interest in the younger members of the bar of this state. Their love and affection for him was wholly responsive.

His character was notably shown in the enjoyment which he had in the companionship of his wife and in his love for children.

In his death, the State has lost one of its best beloved and most distinguished citizens, this Court an able Judge.

We move that this brief expression of our sincere regard be spread upon the records of this Court.

James D. Shearer,
Charles W. Farnham,
Alf. E. Boyesen,
Thomas S. Wood,
John D. Sullivan,
Henry B. Wenzell,
Hugh T. Halbert.
Committee.

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WILLIAM H. LIGHTNER, ESQ., then addressed the Court, and said:

May it please your Honors:

In seconding the motion in support of this memorial which pays so generous and well-deserved tribute to the memory of the late Mr. Justice Jaggard, it is hardly necessary to add a word.

It was my good fortune to have known intimately Mr. Justice Jaggard for nearly thirty years. When he made St. Paul his home, he spent some time in the office of the legal firm of which I was a member. As bachelors, we lived together. The friendship, commenced upon his coming to Minnesota, continued uninterrupted until his death.

He loved the sunshine and the cheerful side of life. He loved his fellow men; he was ever ready to aid them in their troubles, to encourage them in their successes, which he enjoyed with them. He was particularly fortunate in being free from any disposition to criticise the actions of others. Enthusiastic by nature, he applied himself to his legal studies with fervor, he devoted himself assiduously to the interest of his clients and with love for the companionship of men; as he advanced in his profession he made countless friends. Fired by a praiseworthy ambition to succeed in his chosen profession, with a well-educated mind, with a natural fondness for the study of the law and with enthusiasm supported by untiring energy, it is not surprising that in a comparatively short time he built up a good practice, was chosen District Judge, and while still a young man was elevated by a pronounced vote of the people to the high position which he occupied at the time of his death.

He brought to this bench a disposition to labor to maintain and, if possible, to improve the high standing of the court. He applied himself closely to the arguments, and studiously and patiently examined into the law. His opinions in this Court, many of which relate to most important questions, not only evince great learning and ability, but also exhibit patient, thorough and painstaking investigation of authorities and discussion of legal questions. They show forth a broad and developing mind. Mr. Justice Jaggard had but served his apprenticeship upon this bench. Cut down in the prime of his life, it may be confidently asserted that the State has suffered

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a great loss in being deprived of the great benefits that it would have derived from his ripened mind and his devotion to legal studies.

HOWARD T. ABBOTT, ESQ., then addressed the Court, and said:

May it please the Court:

It is indeed fitting and proper that at such a time as this, we pause from our labors and daily tasks and gather together, the Bench and the Bar, to pay a last tribute to a just Judge and a sincere friend. I shall not touch upon the legal or judicial ability and qualifications of Judge Jaggard in the few words that I shall say. While I have the greatest admiration for him as a lawyer and a judge, I knew him so much better as a true gentleman, and as a sincere friend and companion, that my thoughts more quickly turned, upon hearing of his sudden end, to my own personal loss because of the friendship and association that had existed between us, than they did to the loss which the Court and Bar and the State had sustained. Of late years we had come to know each other well. He had been my personal guest upon numerous visits to Duluth, and was such last summer upon one of the outings which he was known so much to enjoy, and our plans were tentatively arranged for a similar but longer outing this coming summer. I have had in the last few years the extreme privilege of a very close personal association with him. I have often been favored with his innermost principles and ideals, and I knew him in his deeper personality and thoughts perhaps as well, or better, than many of his older friends. My intimate acquaintance with him was not of such long standing, covering possibly only a period of the last eight or ten years, but that friendship had developed and enlarged greatly as those few years passed, and when his sudden end came and the news thereof reached me, the loss was that of something which was very near and dear to me. The bar of the northern part of the state knew him well and were deeply grieved; they were his friends and he was theirs, and each felt that he had sustained an irreparable loss in his sudden demise.

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Judge Jaggard had the inherent qualities to make the thorough gentleman that he was. He had many talents committed to him and consequently more work and engagements to attend to socially, as well as professionally, than one much less endowed. He had accomplishments and refinement of parts by birth, labor and education. He had the help of parentage, association, environment and friendships; he had honor and authority; he had many useful talents entrusted to him, and he did not hide them away or squander them for selfish purposes, but used them in his daily life, in his work and in the service of his friends. Often has he, to my knowledge, directed and advised in more than the ordinary ways, those who needed it, and encouraged many by his wisdom, and particularly was this true and applicable to the younger generation of attorneys. It was his gift to be hospitable, kind and helpful to all, and ever ready to meet friends and strangers with bountiful courtesies. It seemed his joy to cultivate his mind with knowledge, with all worthy accomplishments, befitting his condition and qualifying him for honorable thought and action in all walks of life, so that in very much and in all ways he excelled no less in real inward worth than in his genteel exterior appearance. He possessed to a marked extent the two essential qualities characteristic of the true gentleman,—courtesy and courage. It is a truism to say that, with these and other resources that he had, his conversation was at all times rich and instructive in no ordinary degree; that it was as pleasing as it was wise, and had all the charms of familiarity with all the treasures of knowledge. No man could be more social in spirit, more democratic in his demeanor with friends or strangers or more kind or indulgent towards those who approached him. He was much loved by all the youth who came in contact with him, and I speak from personal knowledge when I say that his fondness and affection for children was immeasureable. Fond of conversation he was, and readily and quietly discoursed upon what was presented by those around him, and often astonished them by the treasures which he drew from the mine which they had, unconsciously perhaps, opened up. In conversation he seemed to have no choice or predilection for any one subject rather than another, but allowed his mind to be opened at

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any letter that his friends might choose to turn up, and selected from his inexhaustible supply what might be best adapted to the taste of those about him. This was true whether the subject was that of law, medicine, mathematics, music or the arts.

We will always recall the pleasant and genial smile so symbolical of the humor within, and the temperate jocularity which gave infinite zest and effect to what he had to say. By those who knew him best, who enjoyed his society apart from the daily duties, who enjoyed his friendship and his comradeship, it is these qualities and courtesies which will be ever before us.

I had no intimation of his ailment until last summer, when I noticed in the trout streams and on the forest trails his exhaustion and fatigue. I remarked upon it to him once or twice, but he made as little of it as possible, and always passed it off as of no consequence. It was, however, apparent to me that he was not in his usual health, and while I was aware of the last trip which he had taken and for what cause, I had no anticipation of its sudden and serious termination. It is hard to have his kind so suddenly removed from earthly activities; the State needs such character and citizenship as his, and will need it more and more; his friends will miss his kindly intercourse, but his genial personality and the many fond memories we have of him, no time can forget, nor distance wear away, but will remain with us forever.

Hon. Oscar Hallam then addressed the Court, and said:

If your Honors please:

We are here to-day to pay a tribute to the memory of a friend, and perhaps to draw some lessons from an active and useful life that is closed. There are those who say that such occasions as these are not worth while; and if there were nothing in life to be desired but meat and drink, then this were true; but it is upon such things as these that character is builded and the thoughts of men rise to higher things. There are those, too, who say that we might better spend our time in an endeavor to cheer the living rather than to

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praise the dead; but after all, I know of no loftier motive to right living than the consciousness that, if men live aright, their lives will be held in fragrant remembrance after they are dead.

Judge Jaggard will be remembered for many things. He filled official position creditably and well. He will be remembered for that. He instructed young men in the principles of law, and he will be remembered for that. He wrote useful books, and he will be remembered for that. But more than all these, he will be remembered for certain traits of heart and character. Some man in Baltimore said, shortly after his death, that Judge Jaggard's greatest work was not Jaggard on Torts or Jaggard on Taxation nor any other of his numerous intellectual achievements, but Jaggard on Humanity. He knew many people and he loved to meet them. He had many friends, and he loved to associate with them. He knew how to help people, and he loved to extend his assistance where it would afford help.

Judge Jaggard was a man of singular individuality. His mode of life, his manner of thought and work, his forms of expression, were singularly his own. I remember well the first time I ever heard him speak. It is now nearly twenty years ago. There were other talented men who spoke on that occasion. Of them I simply remember the fact that they spoke. Of him I remember the theme, the treatment of it and many of the things that he said. I heard him speak many times afterward, and somehow, I knew not just why, I seemed to carry away more of what he said than I had expected I would. He possessed the singular faculty of impressing his thoughts and words in such manner that they would be remembered.

His written decisions were characteristic of the man. Open a volume of the Minnesota Reports to one of his opinions, start to read it in the middle or where you will, and it is likely that before you have read a page you will strike some expression that will make you say: "That sounds like Judge Jaggard." His writings bear the stamp of the writer's own individuality more than anything I have ever read.

When the news of his death came, I was sitting with a regent of the University and with a graduate of its college of law. With

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one accord they at once stated: There was one of the best beloved teachers that the university has ever had. The men of those classes clung to him, and his memory is entwined in their lives. He had and he exercised an influence beyond that of the mere position in life that he held, beyond that of his intellectual attainments or his intellectual achievements; it was the influence of a lovable character.

His last days among us furnish a beautiful example of Christian fortitude. We who knew him well and met him often did not know that he was suffering pain, and yet we know now that he was.

His life, his character, his example and his influence were such that we may truly say the world is measurably better that this man has lived.

Hon. Julius Haycraft then addressed the Court, and said:

If it please the Court:

It is my privilege to have known Judge Jaggard. It is my privilege to have claimed him as a friend; not exactly an intimate friendship such as is caused by daily association, yet intimate in the sense of men separated by some distance. It is my privilege to have been one of the young attorneys in this state in whom he manifested a fatherly interest. It is now my privilege to stand before this tribunal, before his associates and his successor, in the presence of the Bar of this state, and participate in his memorial exercises. I join with the authors of his memorial and with the gentlemen who have spoken, in their estimate of Judge Jaggard as a jurist, as a scholar, an author and an orator. Without detracting in the slightest degree from his worth in these accomplishments, yet I shall direct my remarks more particularly and specifically to Judge Jaggard, the man. While his claim to fame as a jurist, as a scholar and author is pre-eminently of an enduring nature and high degree, still it occurs to me that his greatest claim to fame and to fond remembrance in the hearts of the people is based upon his acts as a man. For he was a man in all the term "man" implies; in all for which it

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stands. I can pay him no higher tribute, I can accord him no loftier panegyric, than to say of him in this sense he was a man, broadminded, large-hearted, charitable, kind, considerate, and lovable; traits which spell greatness in its truest sense. He was such a man as to whom unacquainted children would intuitively go to have him mend their toys, or act as arbiter of their disputes, and children are the best judges of human character.

Shortly before last Christmas, he said to a friend in this building that he was happy because he had all his presents arranged for. He was asked how many he remembered with Christmas presents; he replied about three hundred. I offer the statement that no one in this state remembered so many friends with presents on the anniversary of our Saviour's birth. Fishing companions, country hosts on outing trips, neglected children, lawyers, statesmen, employees and associates; all came within the compass of his great and generous heart.

Judge Jaggard was pre-eminently a child of nature. He loved the brooks and rills, the lakes, the hills, the fields and meadows. He loved to hunt and fish, and, as he was wont to state it, "watch the pussy willows grow." His companions upon these jaunts invariably became his lifelong friends. It is told me that a native fisherman in this state who was careless about the exercise of his franchise, after a fishing expedition one summer with Judge Jaggard, appeared at the polling place at the next election, and to the surprise of all called for a ballot. In the booth he was assisted in marking. He said: "Where is Judge Jaggard's name?" The name was indicated. He said, "Cross his name and fold the ballot; I do not care to vote for anybody else." It is these traits and these characteristics which warrant any tribute and any honor we may choose to accord our late lamented brother as a man. Give me a man like that who is charitable to all, who is kind to his neighbors, loves his friends, forgives his enemies, is true to his family, cherishes his wife, adores his children, worships his God, and I'll pay him tribute though he never held an office.

Judge Jaggard is dead, but his memory lives; lives as lives the name of Mitchell, the name of Flandrau, the name of Davis and other

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distinguished characters of our profession in this state. And for months and years and decades to come will live the name, the illustrious name, EDWIN A. JAGGARD.

JAMES PAIGE, ESQ., then addressed the Court, and said:

If it please the Court:

Edwin A. Jaggard was a lecturer in the College of Law of the University for nineteen years, and during that time wrote the two well known treatises on Torts and Taxation.

Such in mere outline is the history of the work of Judge Jaggard as a teacher of law. It is a privilege to speak of those attributes of mind, and that attractive personality which made him such a charming and successful teacher. As a student of law he approached it from its philosophical and analytical side, and the resolving of questions back to their elementary principles was his delight. He loved to trace the law's growth, its tendency, and sometimes to utter a prophetic word. He had a vivid and bright imagination, enabling him to make truths living and real to the student's mind. To these mental gifts was added that graciousness of manner and charming personality, with its broad human sympathy, which brought a smile from the class as he entered the room and made his lectures full of humor and incident. To one in the corridor rippling laughter over the transom might suggest an entertainment, but within the lecture room stories, touches of satire and pungent criticism were being used to fasten difficult points in the student's mind. This was Judge Jaggard's method of keeping the attention of the student by the force of his personality, using his charm as an individual to compel attention upon matters difficult of comprehension or possibly dreary and tiresome. He thought it worth while to put himself into his lectures, and it was worth while. His inextinguishable youth made him a young man among young men and established a comradeship, drawing students in clusters around him before and after his lectures. The work of his lectureship he regarded as serious, though his lectures were thus embellished with literary allusions, and

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were brilliant with humor and satire. He never treated his work with indifference, and always arranged it on the bench and at the bar so as to meet his obligations to the bar of the state as a legal educator. His scholarship, his brilliancy, and his genial and loving personality insure him a living memory in the mind of alumni and faculty.

CHARLES W. FARNHAM, ESQ., Secretary of the Minnesota State Bar Association, then addressed the Court, and said:

May it please the Court:

Mr. Kay Todd, of the Ramsey County Bar, having been called from the city, has asked me to present his tribute, the testimonial of a *protégé*, pupil and friend.

With a sense of the deepest personal bereavement, I bear this testimony of my admiration and love for Edwin A. Jaggard.

It was my great privilege to come under the influence of this wonderful man at a period when impressions are vivid and lasting, and the heart is warmed with the springs of youth. That acquaintance so formed continued for more than a dozen years, growing more intimate with the years. It was as a student in the University Law School that this friendship began.

As a lecturer, Judge Jaggard peculiarly impressed and held the students, both by the charming and interesting manner of the presentation of his subjects and by a certain broad, human sympathy which immediately placed every man in his classes on a plane of equality with their lecturer, and cemented a feeling of fraternity and comradeship which put every man upon his honor and drew from him the best that was in him, both as student and man. Every one whose privilege it has been to be a student in any of Judge Jaggard's classes has immediately become his warm personal friend and admirer; his follower in future years.

Instances can be multiplied without number of the material assistance extended by Judge Jaggard to ambitious and deserving young men in their efforts as students, and later in the more serious

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pursuits of life. No such young man ever applied for counsel which was not graciously and freely given, or for assistance which was not extended with a generous hand. He was invariably tolerant, broad and sympathetic, and his fine heart qualities won their devotion; his mental attainments and abilities as a jurist, their admiration.

For fifteen years or more, students of Judge Jaggard in the Law School of the University of Minnesota have gone forth in the various avenues of life, and have assumed positions at the bar and on the bench, and in other pursuits; and time and again these men who have passed out from that influence have returned to the ever ready, cheerful adviser and comforter to renew the happy fellowship of their student years.

When in the fullness of time, Judge Jaggard was called from the bar to the bench, he became as judge what he had been as a law lecturer; the friend of the young man. By those means so well known to the Judge, with suggestions and advice, he constantly assisted the struggling young practitioner before him. No young man ever came into Judge Jaggard's court, especially when opposed by a seasoned, expert practitioner, without feeling that, in so far as it lay within the proper power of the Court to do so, in the presentation of his matter it should be upon equality with his more expert opponent. He had the same indescribably charming manner in the court room as in the lecture room, and without loss of dignity, it at once created the atmosphere of human kinship and tolerance which so distinguished him at all times and under all circumstances. These attributes were not alone discernible by those who had the privilege of being thrown into close contact with him as students, or members of his own profession, but extended in an all-embracing degree to laymen as well. This beautiful side of Judge Jaggard's character was accentuated by the fact that, as a Justice of this high Court, and a recognized international authority on several subjects of his chosen science, he remained as simple, unaffected and sincere in his manners, tastes and habits as in the early days of his own struggling professional career. His students were still his "boys," even though they occupied judicial or other eminent positions, and

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as such were greeted, treated and loved by him. Other men may have had as wide a fame in their profession or inspired the love of their own circle of friends, but few ever had a wider, deeper or more genuine affection in the hearts of so many men in the legal profession as had Judge Jaggard, and when the news of his unexpected and untimely death flashed to his home state, there has rarely been more genuine or more intense sorrow experienced by so many men of all walks in life.

It has fallen to the lot of few men to so influence those upon whose shoulders, in time, must fall the more serious responsibilities of the commonwealth.

In the death of this eminent scholar and jurist, the State has lost a valued servant, but he has left a rich heritage, not only by reason of his labors on the bench, but in the full influence of his life, especially as a guide and coworker, a helper, and an inspiration to the younger members of the bar, not only as an instructor in the law but as a preceptor and as a brother in the lessons and struggles of life.

Chief Justice START then said:

The Court will be glad to hear from other members of the bar.

HON. JOHN W. WILLIS then addressed the Court, and said:

May it please your Honors:

I am sure that no dissent from the eulogium which has been pronounced upon Edwin Ames Jaggard will ever be heard. The expressions of the memorial are just, and could not well be more than adequate because of the dignity, the importance and the amplitude of the subject to which they are addressed. Fortunate as was the State of Minnesota in acquiring Jaggard as a citizen, commensurate is the sadness of the bereavement which the state and its citizenship now experience.

When the District Court honored me with the position as exami-

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ner in law, and a young gentleman who had recently come from the state of Pennsylvania presented himself before that board for admission to the bar, the members of the examining board knew nothing except that his name was Jaggard, and that he handed us a certificate of graduation from Dickinson College and from the law department of the great University of Pennsylvania. But no sooner had the questioning begun than the excellence of his training, the scholarship which he possessed and the philosophical insight which he had obtained regarding the principles of jurisprudence became manifest, and, not to dwell too long upon this subject, it is one of those pleasant recollections which echo through the halls of memory to recall that Justice Jaggard and I always joked with each other when we met, over the fact that he could read the Latin of his certificates and translate it into good English; a test which no other applicant for admission to the bar was ever able to undergo with success.

I wish to emphasize only one characteristic of Judge Jaggard which, perhaps, has not been dwelt upon sufficiently. We hear much to-day of the responsibility of the scholar and of the desirability of having the scholar in politics, and having the attention of the scholar directed to the control and influence of public affairs. If we have ever had an example of the scholar in politics and the scholar in public affairs, such is the example of the lamented jurist towards whom our words of commemoration are this day directed. He was a scholar who did not treasure selfishly in his own heart and brain the learning of past ages and the learning of modern times, but he placed it all at the disposal of his fellow citizens in a generous effort to help in every walk of life with the lessons drawn from the experience of the past and from the wisdom stored in the great libraries which the human race has accumulated. He was a glorious character in social life, an ornament to the Bar, a memorably successful jurist in the concluding years of his useful life, and all the recollections that can be gathered from the common people, from the members of our profession, and from the world at large will constitute an amaranthine wreath which will forever hang revered in the halls of Minnesota's memory.

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Chief Justice START then said:
Mr. Justice Bunn will respond for the Court.

Associate Justice BUNN then said:

Gentlemen, the Court is in full accord with your memorial and with the merited tributes to the late Justice Jaggard.

I knew Justice Jaggard well. I knew him when we were both at the bar; I knew him as a lawyer trying cases before me after I went upon the district bench. We were closely associated on that bench for six years, and I have watched his work since he left that bench to adorn this with the peculiar interest that the trial judge has in the decisions of the higher court. I also knew Jaggard the fisherman and Jaggard the man.

As a lawyer he was learned in the law; a careful pleader; a close reasoner; a powerful advocate. As district judge, his record made during the six years that he held that position was such that he was called by the people of the state to the highest sphere of usefulness, the bench of the Appellate Court.

He served as an associate justice of this court a little over six years. His work here is preserved in Volumes 94 to 114. He wrote opinions in approximately four hundred cases, many of them important. His opinions bear conducive evidence of great research and are uniformly scholarly and illuminating. He had a great command of language and a wonderful facility in expressing his thoughts, and generally exhausted the law in each case. Indeed, many of his opinions are elaborate treatises. He loved to find the source of a legal principle and follow it down through its various branches, even as he loved to follow a trout stream, not missing any prominent brook or rivulet along the way. To quote Charles Lamb: "He was a brother of the angler, and just such a free, hearty, honest companion as Mr. Isaac Walton would have chosen to go 'fishing with.' " He delighted in the waters, fields and woods. He really loved nature. He who knew Judge Jaggard around the camp fire after a strenuous day with the trout or bass, knew him at his best.

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He was delightful. Indeed, personally he was a lovable character, and always a charming companion.

He was a remarkable public speaker, and a writer of great ability. His works on legal subjects will live.

But it is Jaggard the man that is most missed. He had more friends than most men, and they loved him. He was always courteous and thoughtful of others. He was kind and charitable. The guides on the river and trail, the janitors in the capitol, the servants in his club and in his home, are losers by his death. He was essentially a cheerful man, a true optimist. He loved life, and got much out of it. It is characteristic of the man that while suffering from the incurable disease that caused his death, and knowing that his life might end at any time, he not only did not complain, but his greeting was as cheery, his smile as infectious, his company as enjoyable as ever. His associates and intimate friends never knew of his condition. This was heroism, and, to me, wonderful. He was, if not happy himself, still the cause of happiness in others. The world can ill spare such a man.

Chief Justice START then said:

Gentlemen of the Bar:

To live in hearts is never to die. Mr. Justice Jaggard lives in the loving remembrance of the Bench and Bar, and people of Minnesota, and it is fitting that your eloquent and just memorial should be entered of record, with the addresses in support of it, and, as a further tribute to his memory, that the Court now adjourn.

It is so ordered.

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CORRECTION.

Page. 163. Title of case should be Emma Patzke v. Minneapolis & St. Louis Railroad Company.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

PLUMA M. BROWN and Others v. HERMAN L. STROM and Others.[1]

December 16, 1910.

Nos. 16,285—(9)[2]

Jurisdiction of district court in aiding settlement of estate — injunction.

Plaintiffs' complaint set forth: Decedent owned two hundred ten out of four hundred shares in defendant bank. The executor of his estate, who was also cashier of the bank, conspired with the other named defendants to part with control of the bank by the sale of thirty of those shares to Strom's friends, defendants herein, at an inadequate price. This sale was made nearly two months before the time for filing claims against the estate would expire. Plaintiffs were ready and had arranged to procure funds to discharge the obligations of the estate. These allegations were controverted. The district court restrained various individual defendants from disposing of their bank stock and the bank from recognizing any assignment. It is *held:*

1. A probate court is a court of record and has original and exclusive jurisdiction in the administration of the affairs of deceased persons. An

[1]Reported in 129 N. W. 136.

113 M.—1.

[2]October, 1910, term calendar.

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executor has the right of possession of the personal estate of decedent and the power to dispose thereof.

2. The district court, as a court of chancery, may not interfere with the exercise of the constitutional powers of the probate court, but in the interest of justice may exercise an ancillary jurisdiction, to aid the probate court in the performance of its proper functions.

3. In the case at bar it was competent for the district court, in order to preserve the property in statu quo, to restrain the executor as an individual and other stockholders and the bank from disposing of shares of stock in that bank involved in the proper administration of the estate.

Action in the district court for Jackson county by the widow and children of John K. Brown, deceased, against Herman L. Strom, Thomas J. Knox, John W. Cowing and the Brown National Bank of Jackson to set aside two sales of bank stock made by defendant Strom, as executor of the estate of John K. Brown, deceased, to certain of the other defendants, to have the shares reassigned to him, and in case such relief were denied, then that defendant Strom be declared a trustee, for the benefit of the estate, of the shares of bank stock personally owned by him in the bank, and for an injunction restraining defendant Strom from disposing of any other shares of stock in the bank.

A temporary restraining order was issued to restrain defendant Strom from selling any of the balance of the stock belonging to the estate, and an order directing defendants to show cause why the temporary injunctions prayed for in the complaint should not be granted. The matter was heard by Quinn, J., who ordered that the writ should issue upon plaintiffs' filing a bond for the sum of $250. From that order, defendant Strom, as executor of the estate, appealed. Modified.

Knox & Faber and *Dunn & Carlson,* for appellants.

E. H. Nicholas and *Putnam & Nicholson,* for respondents.

JAGGARD, J.

The complaint of plaintiffs and respondents set forth: Plaintiffs are the widow and only heirs of John K. Brown, deceased. Under

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Brown's will, defendant Strom and one Haugen were made executors. Haugen resigned, but petitioned the probate court to appoint the widow of deceased as coexecutor, to act jointly with Strom. Strom, Haugen, and deceased had been intimate friends. Notwithstanding this situation, the widow was not appointed executor, and Strom served alone. The decedent owned two hundred ten out of the four hundred shares of the capital stock of the defendant bank. Nearly two months before the time for filing claims against the Brown estate would expire, Strom sold thirty shares of the capital stock of the Brown estate to the defendants Cowing and Knox, who were directors of the bank, and, respectively, president and vice president thereof. This was pursuant to a conspiracy between them to deprive plaintiffs of control of the bank, and to transfer that control to Strom and his friends. The price paid was only $105.75 per share; whereas, in fact, the value was $125 per share. This sale was made, despite the protest of the plaintiffs, made to the probate judge, and despite notice to Strom that the said plaintiffs were "ready and willing to advance all moneys on demand that might be necessary to meet any claims or obligations of any kind or nature of the estate that required to be promptly met, and * * * that * * * they had arranged to procure the funds in order to make good the said representations." The sale and transfer of this stock lost the estate the control of the affairs of the bank, to the profit of Strom and his conspirators, was wholly unnecessary in the due administration of the estate, and would work great and irreparable injury to the estate. The complaint prayed for a temporary injunction.

The defendants, inter alia, denied the conspiracy, and asserted that the sale of the stock and its purchase were in good faith, and that its proceeds were needed and used to defray the actual bona fide indebtedness of the estate. They insisted, further, that the plaintiffs were not entitled to relief, that there was defect of parties defendant, and that the court had no jurisdiction.

The complaint was supported and opposed by affidavits. Thereupon the trial court found facts in accordance with the plaintiffs' contentions, and granted a temporary injunction, whereby defendants Knox and Cowing were restrained from disposing of the shares

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of stock which they had purchased from the executor, and Strom, the executor, was restrained from disposing of any of the remaining one hundred eighty shares, Strom as an individual from disposing of any of his fifty shares, and the bank itself was restrained from disposing of any stock in the name of the estate, or of the defendant as executor of the estate. From this order the defendants appealed.

1. The principal contention of the defendants is that the district court was without jurisdiction to entertain the complaint and to grant the relief. "By this judicial raid upon the jurisdiction of the probate court the district court of Jackson county lays its hands upon the executor and determines what personal property he shall sell and what he shall not sell." The defendants refer in this connection to many cases in which the exclusive character of the jurisdiction of the probate court is sustained. See Cone v. Hooper, 18 Minn. 476 (531); Jacobs v. Fouse, 23 Minn. 51; State v. Ueland, 30 Minn. 277, 15 N. W. 245; State v. Probate Court of Sibley County, 33 Minn. 94, 22 N. W. 10; Wiswell v. Wiswell, 35 Minn. 371, 29 N. W. 166; Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. 792; Reiser v. Gigrich, 59 Minn. 368, 61 N. W. 30; Boltz v. Schutz, 61 Minn. 444, 64 N. W. 48; Starkey v. Sweeney, 71 Minn. 241, 73 N. W. 859; O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148; Betcher v. Betcher, 83 Minn. 215, 86 N. W. 1; Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944; Appleby v. Watkins, 95 Minn. 455, 104 N. W. 301; Gary, Probate Law (3d Ed.) §§ 565 and 566; R. L. 1905, §§ 3705–3766; Steel v. Holladay, 20 Ore. 70, 25 Pac. 69, 10 L.R.A. 670; Adams v. Petrain, 11 Ore. 304, 3 Pac. 163.

It is clearly settled on the one hand: The probate court in this state is a court of record of original jurisdiction, and as such has exclusive jurisdiction of the administration of the estate of deceased persons. Under the orders of the probate court, an executor has power to dispose of the goods and chattels of the deceased. No heir or beneficiary can hold or retain possession of such portions of the personal estate as he may assert or claim title to. To so permit would lead to such confusion as would bring disaster to the probate court. The jurisdiction of the district court with respect to administration by the probate court ordinarily is appellate only.

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The probate court has the power in appropriate cases, on proper application, to direct its officers as executors. See Cone v. Hooper, supra; Wiswell v. Wiswell, supra; Culver v. Hardenbergh, supra; Starkey v. Sweeney, supra; Jacobs v. Fouse, supra; State v. Ueland, supra; O'Brien v. Larson, supra; Boltz v. Schutz, supra; Betcher v. Betcher, supra; Appleby v. Watkins, supra; Graffam v. Ray, 91 Me. 234, 39 Atl. 569; Steel v. Holladay, supra.

On the other hand, there is a primary difference between the jurisdiction, the positive powers, and the machinery of a general court of equity, and of a mere probate court, in general, and under the laws of this state in particular. The law is concerned not so much with working out an abstract and ideal harmony with respect to the limits of this dual jurisdiction as it is with the efficient administration of practical justice thereby. When a situation presents itself to which in its nature a probate court is not equal, a court of equity may step in and see that justice is done. This it can do without trespassing at all on the constitutional authority of the probate court, and without any interference with the due administration of an estate of a decedent. There need be no conflicting judgment or orders. As to matters properly within its jurisdiction, the probate court is supreme, and its decrees are given conclusive force, subject, of course, to appeal. But a court of equity may effectuate, without in any wise controverting, such decrees; that is, if occasion arises, a chancellor may act in aid of a probate court, and make possible the proper performance of its functions in administering an estate by preserving that estate. The jurisdiction of the equity court in such cases is ancillary to that of the probate court. There need be no conflict, nor interference, but merely assistance. Doubtless such occasions are rare; but their infrequency is no argument why equity should not afford a remedy for the wrong when the situation arises.

In the case at bar, upon the assumption of the truth of the facts stated—and we wish to make it clear upon that assumption only, and not upon a determination that the merits are with the plaintiffs—a state of facts was presented for which the probate judge could provide no adequate remedy. Defendants Knox and Cowing were

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clearly beyond the jurisdiction of that court. They were total strangers to the estate. Less clearly, both Strom as an individual and the bank were beyond the reach of the instrumentalities available to the probate court. Strom, as executor, it could control and direct. Proceeding further upon this assumption, we think that the complaint clearly made out a case for equitable interference, to prevent the loss of control of the bank by the plaintiffs through the conspiracy of the defendants and for an inadequate price. The district court had jurisdiction to preserve the estate for administration by the probate court; i. e., to maintain the status quo until the probate court had opportunity to perform its functions with respect thereto, and to restrain third persons, over whom the probate court had no jurisdiction, from interfering with the estate until controversies had been settled. Such a course would in no wise disturb the probate court. On the contrary, it would tend to make it possible for it to discharge its constitutional duties.

This view of the law is sustained by authorities which are more apt than numerous. In Heirs v. Adams, 22 Vt. 50, at pages 58, 59, Redfield, J., said: "It has always been said that courts of probate have as much the exclusive jurisdiction of the matters coming properly within their cognizance as any other courts of law. Hence, when the courts of chancery have interfered in the settlement of estates, it has been merely in aid of the powers of the court of probate, and where, from some defect of the adequate means, it was not in their power to do the same justice, in the same way, which could be done in a court of equity, and which it seemed desirable should be done in the particular case. This is a policy established in a long and uniform course of decisions, upon grounds which have always approved themselves to the profession and the citizens at large, and which there is no necessity and no sufficient reason now to disregard. * * * It is to be borne in mind, too, in determining how far a court of chancery will interfere to aid the jurisdiction of the courts of probate, that the probate courts already have a very extensive chancery jurisdiction, by which claims, in some respects of purely equitable cognizance, may be there adjusted. But for the most part that court has not, by its mode of procedure, such ade-

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quate means of giving full redress in matters of purely equitable nature as exist in the courts of equity. Hence, as a general thing, no doubt, the court of chancery retains its ancillary jurisdiction to the same extent over matters in the probate courts which it has over those in the common law courts." To the same effect it was held in McDonald v. Aten, 1 Oh. St. 293.

In Mock v. Pleasants, 34 Ark. 63, creditors of an estate brought an action against the administrators and others, and alleged, among other things, that the administratrix and others conspired together to have land sold and bought in at a nominal price (twenty-five cents per acre) for her benefit, and that the sale was the result of that conspiracy; and accordingly they prayed for relief against the fraud. It was held the probate court had exclusive jurisdiction in matters of estates of deceased persons, and that a court of chancery can take cognizance thereof only upon one of the equitable grounds of jurisdiction. A settlement of an administrator in the probate court has the effect of a judgment, and can be set aside by a court of chancery for fraud. Accordingly, although the acts had been confirmed by the probate court, the demurrer was overruled, and the defendant was required to answer.

In Hart v. Hart, 44 Conn. 327, heirs signed a contract for the settlement of an estate in probate court according to the draft of an imperfect will. One weak-minded heir, ignorant of his rights, unduly influenced by the others, relinquished a much larger interest than he received. He brought an action in the superior court to set aside the agreement and for an injunction against the proceedings in the probate court under it. It was held that the court of probate would be powerless to prevent such a wrong, and that the superior court had jurisdiction to provide a remedy. And see Crain v. Crain, 17 Tex. 80, and Piatt v. Longworth's Devisees, 27 Oh. St. 159.

This view of the law finds some, but not explicit, sanction by indirect reasoning in some Minnesota cases. State v. Probate Court of Sibley County, 33 Minn. 94, 22 N. W. 10; Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59; Mousseau v. Mousseau, 40 Minn. 236, 41 N. W. 977; Comstock v. Matthews, 55 Minn.

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111, 56 N. W. 583; State v. Probate Court of Ramsey County, 103 Minn. 325, 115 N. W. 173. And see McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589. And see 3 Pomeroy, Equity Jurisprudence (3d Ed.) § 1154, and note.

2. Defendants have urged a number of additional considerations, which we regard as without merit. Thus they insist that the writ should have been denied on the merits. It is evident from the statement of the case that the controversies therein involved should be determined on trial, and not on affidavits. In this opinion, accordingly, the court has proceeded upon the express assumption that the facts as stated by plaintiffs are substantially correct. The court does not predetermine the case, but leaves the question of the merits to the trial court, subject to reversal according to law.

A number of objections are addressed to the parties to the action. Defendants insist that the probate court alone could determine who the heirs at law may be, and plaintiffs' allegations on this subject in the complaint were negligible. For purposes merely of this action, however, and in order that the estate might be preserved until formal administration, the allegations as to plaintiffs' right to litigate were adequate. If, in its final decree, the probate court should determine that these plaintiffs had not the right which they claim, no harm would result. That chance, however, would appear to be fanciful in this case.

Defendants also urge that there was defect of parties, inasmuch as the creditors were not joined. One of the causes of complaint against the executor, however, was that the stock was sold nearly two months before the time for filing claims against the estate would expire. Until such time the creditors would necessarily be undetermined. Moreover, there is no reason why the creditors, when known, could not be made parties at a later time to as good advantage. The whole object of the proceedings, however, was to preserve the estate. The rights of the creditors were in no way invaded, nor threatened. What was done must have been done for their advantage.

Nor is there any force to the contention that, because Strom was improperly joined in his personal and in his representative capaci-

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ties, the action did not lie. We think the injunction did not lie against Strom as an executor, because the probate court could control his action; and to that extent the injunction order must be modified. But the effect of this error in no wise vitiated the action as to Strom as an individual, or as to the other defendants.

Defendants insist that until administration and distribution the heirs at law have no more right to the possession of personal property than a mere stranger, and cannot maintain any action in relation thereto. To some circumstances this principle undoubtedly applies. But defendants' contention that under no circumstances can the heirs maintain an action with respect to the property they have inherited while in the hands of an executor is unreasonable and unsound. On the death of the decedent the property descends to the heirs at law. In each case it is subject to the payment of the debts. Primary responsibility therefor is on the personalty. But the beneficial interest in the real property and in the corpus of the personalty is in the heirs. The personal representative of the decedent, charged with the duty of administration, has neither the rights nor the responsibilities of an owner. In special cases the right of the heirs may be shown to be superior to those of the personal representative, and may be successfully asserted against the personal representative and third persons by the heirs. For reasons previously herein stated, we think that the present, upon the assumption of the truth of the complaint, is such a case.

3. The question then arises whether the complaint states a cause of action. In large measure consideration of this subject has been necessarily anticipated. Upon the facts, if proved, plaintiffs are entitled to certain relief. The nature of that relief has been previously indicated. It is true that the complaint does not recognize the right of the probate court to administer the estate, and the ancillary character of the interference by the district court, nor does the complaint allege plaintiffs' intention to proceed in probate court. In point of fact the whole proceeding is a new one in this state. Plaintiffs were necessarily uncertain as to what was the propr procedure. Their complaint was almost inevitably an informal one. We are not called upon, however, to consider or determine the final

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form such complaint should assume. The only question before us is whether it was sufficient to entitle plaintiffs to some relief by way of temporary injunction. We have expressed our opinion that the injunction was properly granted, except as to Strom as an executor. In this view the defects in the complaint are not at present material.

To conclude: Exclusive jurisdiction to administer the estate must be conceded to the probate court. The propriety of the acts of Executor Strom in selling the stock must be determined originally in the probate court, with the right of appeal to the district court in regular course. The jurisdiction of the district court in this action is to merely preserve the estate in statu quo. If, as the result of the proceedings in the probate court, Executor Strom is removed, his successor may be authorized by the probate court to bring an action in the district court to set aside the sale of the stock, or other relief may be afforded. If the plaintiffs take no action in the probate court, the defendants will have their remedy as in other cases of neglect of a plaintiff to take further steps to procure relief. If the plaintiffs attempt to proceed directly in the district court, instead of in the probate court, the district court must refuse to grant any further relief. That court performed its function in the premises when it issued an injunction to maintain the status quo during the time necessary to determine the propriety and good faith of Strom's act, in proceedings to be conducted in the probate court.

The judgment of the trial court must accordingly be modified. The case is remanded, with directions to rescind the order in so far as it affects Strom as an executor.

START, C. J. (dissenting).

I dissent. I am of the opinion that the district court has no jurisdiction in this case. Reduced to its lowest terms, the claim of the respondents is that the district court had jurisdiction because the stock was sold for a sum materially less than its value, that there was no necessity for the sale, which was made to deprive them of the control of the bank, and that they have no adequate remedy, except by this action. This conclusion by no means follows from the premises. Probate courts of this state have original and exclu-

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sive jurisdiction over the estates of deceased persons and persons under guardianship. While they have no general equity powers, yet as respects the subjects committed by the constitution to their exclusive jurisdiction they have the plenary powers, legal and equitable, that any court has. Therefore the exercise of such jurisdiction cannot be interfered with by an injunction from the district court. O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148.

It is true that the jurisdiction of the probate court does not extend to the determination of controversies between the personal representative of the decedent and a third person as to property claimed by him under the decedent, or an heir, or to an action to recover real or personal property from such third person, or to collect a debt alleged to be due from him to the estate. There are also other exceptions, but none of them is here relevant. It is also true that in exceptional cases courts of equity may exercise jurisdiction where the probate court, without such aid, is manifestly unable to afford an adequate remedy for an alleged wrong to the estate, or heirs, or creditors. Is this such a case? It seems to me that it is not, but an attempt to usurp a jurisdiction belonging exclusively to the probate court, which, if sustained, will be far-reaching in its effect, and open wide the door for the interference of the district court with the probate court in the exercise of its jurisdiction.

case. The executor had a right to sell the stock, if he did so in good

The probate court has full power to deal adequately with this faith and for a fair price. If he fraudulently sold the stock for an inadequate price, the probate court can surcharge his account with the loss. There is no allegation that either he or his surety is insolvent. Hence the alleged jurisdiction of the district court must rest solely upon the further claim that the stock was sold unnecessarily, for the fraudulent purpose of depriving the respondents of the ultimate control of the bank, in case the stock should be assigned to them in the ordinary course of the administration of the estate. If such be the case, the respondents have a plain and adequate remedy, by applying to the probate court to direct the executor to bring an action in the district court to obtain a return of the stock to the executor, or to permit them to bring and prosecute such action in

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the name of the executor. Such action could be promptly brought; for it is to be presumed that the probate court would, if a proper showing was made, grant the relief asked for, and, if necessary, remove the executor. The respondents, as heirs, have not an absolute right to have the bank stock belonging to the estate retained by the executor and assigned to them on a distribution of the residue of the estate by the probate court. Whether such a course shall be taken depends upon the necessities of the estate and the direction of the probate court in the exercise of a fair discretion. The ignoring of the probate court in this case necessarily deprives it of control of the executor as to the bank stock, including that still in his hands, and of jurisdiction to determine whether the stock shall be sold if the necessities of the administration require it, or retained and eventually assigned to the respondents.

CHARLES G. BLOOMQUIST v. MINNEAPOLIS STREET RAILWAY COMPANY.[1]

December 16, 1910.

Nos. 16,530, 16,531—(105, 106).[2]

Collision with street car — wilful negligence — verdict.

Plaintiff, driving in a wagon, parallel with a street car track, undertook to cross in front of a car approaching in the same direction in which he was going. It is *held* that the trial court properly refused to apply the doctrine of wilful negligence in the collision which then occurred.

Two actions in the district court for Hennepin county, one by Charles G. Bloomquist, to recover $16,300 for personal injuries sustained in a collision with defendant's street car, and the other

[1]Reported in 129 N. W. 130. [2]April, 1910, term calendar.

[Note] Injuries by street car collisions with vehicles or horses, see note in 25 L.R.A. 508.

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by him and his partner to recover $350 for injury to property. The facts are stated in the opinion. The answers were general denials. The cases were tried together before Brooks, J., and a jury which returned verdicts in favor of defendant. From orders denying their motions for a new trial, plaintiffs appealed. Affirmed.

Dodge & Tautges, for appellants.

John F. Dahl, W. O. Stout, and *D. R. Frost,* for respondent.

JAGGARD, J.

Plaintiff and appellant in one action, Bloomquist, was driving a horse and wagon with contents, the property of plaintiff and appellant partnership in another action, Bloomquist & Co., on the left-hand side of the street going north because the right-hand side was unsafe and otherwise undesirable. The car of defendant and respondent street car company was being operated by it on the right-hand side of the street going north. There was occasion for use of considerable care by defendant in the management of its cars at this point. At a public crossing plaintiff Bloomquist undertook to drive across the street car track. A collision occurred. Damage resulted. Plaintiff brought one action to recover for personal injuries. The partnership brought another action to recover damage done to its horse, wagon, and contents. Both cases were submitted to the jury. Verdicts were found for the defendant. This appeal was taken from the order of the trial court denying plaintiff's motion for a new trial in each case.

1. Plaintiffs insist that the verdicts were not justified by the evidence. This raises an issue of pure fact. An examination of the record in the light of defendant's brief has satisfied us that it contains some evidence reasonably tending to sustain the verdicts. Its detailed discussion would merely incumber the reports. Under the familiar rule on the subject we feel constrained to affirm the verdict.

2. Plaintiff further urges that the doctrine of wilful negligence or the doctrine of the last clear chance applied to the facts in this case, and that the trial court was in error because it refused to give proper requests and in other wise to charge thereto. The dispute

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as to the law on this point was determined by the majority opinion in Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., 103 Minn. 224, 114 N. W. 1123. Its further discussion would serve no useful purpose. The rule in Rawitzer v. St. Paul City Ry. Co., 98 Minn. 294, 108 N. W. 271, and the Anderson case either is the same or else the Rawitzer case must be regarded as having been overruled by the Anderson case. The only question here is whether the court properly refused to apply that doctrine to this case.

The motoneer testified that he was passing a shaving wagon going north on the right hand. He was then going three or four miles an hour. "Just as soon as I cleared that [about fifteen or twenty feet past the shaving wagon] I let off the brakes and then looked around and Mr. Bloomquist was about fifty-five feet away then, when he started to cross the tracks." In another place the witness estimated the distance at seventy-five feet. When the brake was released "the car started off down hill pretty quick" at eight or nine miles an hour. It may not be impossible, but it is unreasonable, to strain plaintiff's testimony into sustaining the inference that the distance between the point thus fixed by the motoneer where the car was when Bloomquist started to cross the track and the point of collision as being a larger distance, from one hundred to one hundred fifty feet. Without doubt the view of this testimony most favorable to plaintiff must be taken. On the facts as so viewed, if the law imposed on plaintiff the duty of exercising care to avoid the damaging consequences of plaintiff's own neglect at the point where defendant readily could and reasonably should have discovered plaintiff's peril, then the question of defendant's responsibility would probably have been for the jury.

Whether the same conclusion would follow under the accepted doctrine of "wilful negligence" is not so clear. The writer of this opinion confesses his inability to apply that doctrine with any degree of certainty, and is convinced by this case, among others, of the fallacies inevitably consequent upon the use of that inconsistent term. At all events defendant's liability must be determined by reference to the conduct of the motoneer subsequent to the time at which he first actually discovered Bloomquist in a position of peril. If he

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was not guilty of wilful negligence in that conduct the defendant is not liable.

The evidence is to the effect that from that point he did all any one could have done to have stopped the car. It is true there is testimony that he did not give notice or warning of the approach of the car to Bloomquist, who was apparently oblivious of the dangers. But it is not evident that to have given such notice or warning would have helped Bloomquist or would have avoided the harm here complained of. The motoneer was occupied trying to stop the car. The trial court may properly have regarded the fact that the motoneer did not give notice or warning or take other steps as due to the necessity imposed by the emergency of using the small fraction of time available in trying to stop the car. If the motoneer's judgment in that respect was not good, defendant's liability would not follow because of that emergency feature.

The majority of the court are of the opinion that there was no evidence of wilful negligence; and that plaintiff did not bear the proof [burden] resting on him to show failure to exercise due care to avoid injury to Bloomquist on the wagon after the motoneer actually discovered the peril which Bloomquist's own negligence created. Judges BROWN and O'BRIEN are of the opinion "that the evidence tends to show that the motoneer discovered plaintiff on the track in a position of peril in ample time to have stopped the car; yet he made no effort to do so until it was too late. The question of wilful negligence should therefore have been submitted to the jury. Rawitzer v. St. Paul City Ry. Co., 93 Minn. 84 [100 N. W. 664]."

3. Plaintiff assigns as error the trial court's charge that "the issues in the cases are the same except as to the damages alleged and claimed, and if a verdict should be returned against the defendant in one case, it should be returned in both. * * * If a verdict should be returned in favor of the defendant in one case, then the defendant is entitled to a verdict in both cases." The court elsewhere charged as to damages. The language here objected to was not error under the circumstances. The principle of Harmon v. Chicago & N. W. Ry. Co., 107 Minn. 479, 120 N. W. 1022, does not apply.

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4. Of the other assignments only one do we regard as material. The court gave the conventional charge as to the reciprocal rights and duties of the driver of the team about to cross a street railway track and of the company operating a car thereon under the circumstances here presented. Taken as a whole the charge was correct. In some parts there was verbal inaccuracy. Attention of the trial court should have been called to this informality before the jury retired. The case is within the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

Affirmed.

On January 6, 1911, the following opinion was filed:

PER CURIAM.

This cause having been reargued on appellant's motion, and further considered by the court, we are of the opinion that the original decision must be, and it is, adhered to.

Order affirmed.

AMERICAN BRIDGE COMPANY v. G. T. HONSTAIN and Others.[1]

December 16, 1910.

Nos. 16,769—(119)[2]

Account books — foreign corporation — mechanics' liens.

Appeal from a judgment establishing and enforcing mechanics' liens on the premises described in the complaint in favor of the respective respondents. *Held:*

1. No inflexible rule can be laid down for the determination of the question whether entries in account books were made substantially contem-

[1]Reported in 128 N. W. 1014. [2]October, 1910, term calendar.

[Note] Party's books of account as evidence in his own favor, see note in 52 L.R.A. 546.

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poraneous with the transactions which they record. Each case must be determined by the trial judge in the exercise of a practical discretion, in view of modern business methods; and his decision thereon will not be reversed if there be any evidence fairly tending to sustain it. The court did not err in receiving in evidence the account books in this case, nor in the application of payments. Jefferson v. Church of St. Matthew, 41 Minn. 392, followed.

2. The court upon the evidence correctly *held* that certain separators used in the equipment of the elevator were sold to the contractor by one of the lien claimants, a foreign corporation, at Milwaukee, Wisconsin, and that the transaction was not within the provisions of R. L. 1905, §§ 2888, 2889.

3. The evidence was sufficient to sustain the findings of fact as to each claim for a lien, and the record presents no reversible errors.

Action in the district court for Hennepin county to foreclose a mechanic's lien amounting to $9,455.24; to adjudge the sum a lien upon the premises, and that the court direct a sale of the premises and apply the proceeds to the payment of plaintiff's claim. The other lien claimants mentioned in the opinion answered and prayed that the interest of plaintiff and defendants in the premises be determined and the land sold to pay the liens. The case was tried before Hale, J., who made findings establishing the liens of the claimants as stated in the opinion, and directed a sale of the premises to satisfy them. From that part of the judgment in favor of Prinz & Rau Manufacturing Company for $1,392.24, and adjudging the amount a lien upon the premises described; from that part of the judgment in favor of William Bros Boiler & Manufacturing Company for $3,594.09, which was adjudged to be a lien upon the premises; from that part of the judgment in favor of Landers-Morrison-Christenson Company for $10,650.99; from that part of the judgment adjudging $10,538.49 of said last mentioned amount to be a lien upon the premises; from that part of the judgment which ordered the premises sold to satisfy these liens, defendant Northwestern Consolidated Milling Company appealed. Affirmed.

Benton, Molyneaux & Morley, for appellant.

H. D. Irwin, for respondent Prinz & Rau Manufacturing Company.

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Baldwin & Murphy, for respondent William Bros Boiler & Manufacturing Company.

A. S. Keyes and *Henry Ebert,* for respondent Landers-Morrison-Christenson Company.

START, C. J.

Prior to June 10, 1908, the defendant Northwestern Consolidated Milling Company, hereafter referred to as the Milling Company, entered into a contract with the defendant Honstain, whereby he agreed to erect for it upon the premises described in the complaint an elevator. The plaintiff brought this action in the district court of the county of Hennepin to foreclose a mechanic's lien thereon. The defendants other than Honstain and the Milling Company severally appeared and asserted a lien in their behalf for labor and materials furnished and used in the erection of the elevator. The action was tried by the court without a jury, and resulted in a judgment establishing the liens of the respective parties. The Milling Company appealed from so much of the judgment as established the respective liens of the defendants Landers-Morrison-Christenson Company, hereafter referred to as the Landers Company, the Prinz & Rau Manufacturing Company, hereafter referred to as the Prinz Company, and the William Bros Boiler & Manufacturing Company, hereafter referred to as the Boiler Company. Of these, in their order:

1. The court found that the Landers Company was entitled to a lien in the sum of $9,982.16, and awarded judgment accordingly. The alleged errors urged in brief of counsel as to this claim are that the court erred in admitting defendant's books of account, in the application of payments, and that the facts found upon which the judgment is based are not supported by the evidence. The evidence as to the verification of the book accounts, which were received in evidence, tended to show that it was the usual course of the defendant's business to make out a delivery slip for each load of material that was delivered, which was signed by some one in charge of the job, and return it to the bookkeeper; that the delivery slips, when returned, were billed and itemized in the sales book, and thereafter,

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in the ordinary course of business and as soon as practicable, entered in the ledger. The bookkeeper, who testified to these facts, also testified on cross-examination as follows: "Q. Now, these books of account, the original entries, were made at what time? A. The tickets are sent up the following day, and we bill them if we have time. Sometimes we are a little behind. We have no definite time. It might be two or three days. Q. Is it ever longer than two or three days? A. It may be. Q. How long have you known the entries to be deferred? A. I couldn't say any definite time. Q. Ever go as long as a week? A. It may have; yes. Q. Has it ever gone longer than that? A. I can't say as to any definite time when the entries are made out." The Milling Company objected to the admission of the account books in evidence, because no foundation had been laid therefor. The objection was overruled.

The pivotal question is whether there was any evidence tending to sustain the findings of the trial judge that the entries were substantially contemporaneous with the transactions shown by them. R. L. Supp. 1909, § 4719. This was a preliminary question, resting largely in the discretion of the trial judge. McManus v. Nichols-Chisholm Lumber Co., 109 Minn. 355, 123 N. W. 1080. No inflexible rule can be laid down for the determination of the question whether entries in account books were made substantially contemporaneous with the transaction which they record. The term is relative, and each case must be determined upon its own facts by the trial judge, in the exercise of a practical discretion, in view of modern business methods. The trial judge did not abuse his discretion in finding that a sufficient foundation had been laid for the admission in evidence of the account books, and they were properly received.

The Milling Company further urges that Honstain made certain payments to Landers Company from money received from the Milling Company, which was applied by the Landers Company upon his indebtedness to it other than that here in question; that this was a misapplication of the payments, and the amount thereof should be deducted from the amount of the lien claimed by it. It is not clear that the record presents any such question for our decision;

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but, however this may be, we are of the opinion that the claim is without merit. Jefferson v. Church, 41 Minn. 392, 43 N. W. 74. The case cited was expressly approved and followed, as to the application of payments, in the case of Miller v. Shepard, 50 Minn. 268, 272, 52 N. W. 894. These cases have not been overruled by that of Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624. We find, upon an examination of the evidence, that it is sufficient to sustain the findings of fact of the trial court.

2. The lien of the Prinz Company was established in the sum of $1,296, for separators furnished for the elevator. The first objection urged to this claim is that the company is a foreign corporation; that they are doing business in this state, but have not complied with the Somerville law (R. L. 1905, §§ 2888, 2889), and that the transaction out of which the lien accrued was a part of such business. The trial court excluded the certificate of the secretary of state to the effect that the company had not complied with the law, on the ground that the defense was not pleaded. If it be conceded that the reason was not a valid one, yet it was harmless error; for the undisputed evidence shows that the Prinz Company is a foreign corporation having its place of business at Milwaukee, Wisconsin, with a representative in Minneapolis; that Honstain gave to such representative an order on the Prinz Company for the separators of the agreed price of $1,296, free on board at Milwaukee; and that the separators were shipped pursuant to the order from Milwaukee to Minneapolis, and placed by Honstain in the elevator. The trial court found as a matter of fact that the separators were sold at Milwaukee. The evidence is ample to sustain this finding. It follows that the goods were shipped from without the state into the state for the purpose of filling an order given therein, and that the transaction was not within the statute. Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

The last objection to this lien is that the lien statement was invalid by reason of an error in the description of the land; but the statement, read as a whole, justifies the holding of the trial court that it was sufficient to enable an interested person to locate the property

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with reasonable certainty, hence it was valid. Doyle v. Wagner, 100 Minn. 380, 111 N. W. 275.

3. The judgment established a lien in favor of the Boiler Company in the sum of $3,378.09. The only objection here urged to this part of the judgment is that the Boiler Company abandoned its lien. The trial court refused to find such alleged abandonment, and the only question is whether the evidence was such as to require the court so to find as a matter of law.

The evidence not only does not require such a finding, but, on the contrary, it clearly appears therefrom that there was no intention to waive or abandon the lien. The evidence tends to show that a lien statement sufficient in form and substance was filed and recorded; that some three days thereafter, and before the time for filing a lien had expired, some question arose as to the sufficiency of the description of the land in the lien statement, and it was taken from the office of the register of deeds by the notary who drew it. He called the person, who originally verified the statement, over the telephone, informed him of the change, and asked him if he acknowledged it. The answer was that he did. The statement was then refiled and recorded. On the trial the claimant relied wholly upon the lien statement which was originally filed and recorded. The trial court correctly found that the statement as first filed and recorded described the property upon which a lien was claimed in such a manner that it could be found and identified.

It is obvious that there was no intention to abandon or waive the lien, but, on the contrary, a purpose to enforce it. What was done after the lien statement was filed and recorded was a nullity, and could not affect the rights of the parties.

We find no reversible error in the record as to any of the lien claimants.

Judgment affirmed.

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AMERICAN FRUIT PRODUCT COMPANY v. BARRETT & BARRETT.[1]

December 16, 1910.

Nos. 16,810—(120).

Reformation of contract.

A contract entered into under mistake of one of the parties as to its legal effect, coupled with inequitable conduct on the part of the other contracting party, may be reformed in equity.

Reformation of written contract.

But the rule does not apply to a written contract, couched in plain and unambiguous language, concerning which and the legal effect whereof there can be no question, which is signed and executed with full knowledge of its various terms and provisions.

Same — parol evidence to vary writing.

A written contract for the sale of goods provided that orders therefor should be made before a date specifically named. *Held*, that a contemporaneous oral agreement that orders would be received and filled, if made subsequent to the date so named, cannot be incorporated in the contract, within the rule stated, on the theory of reformation; no fraud or deception being shown.

Action in the district court for Ramsey county to recover $1,948.64, balance alleged to be due upon a certain contract. The answer alleged that the defendant executed the contract set out in the complaint, and both plaintiff and defendant understood and agreed that it was therein provided defendant should be given until the close of navigation in which to order shipment, and set up a counterclaim for $9,246.54 for plaintiff's failure to deliver the balance of the vinegar ordered. The facts are stated in the opinion. The case was tried before Bunn, J., who made findings of fact and as conclusion of law ordered judgment in favor of plaintiff for $1,900.52. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

[1]Reported in 128 N. W. 1010.

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W. B. Douglas, for appellant.
Charles J. Tryon, for respondent.

BROWN, J.

Plaintiff is a corporation organized and existing under the laws of the state of New York, located at Rochester, that state, and engaged in the manufacture and sale at wholesale of cider vinegar. Defendant is a corporation under the laws of this state, doing business at St. Paul, dealing at wholesale, largely in cider vinegar. On the twenty-first day of August, 1906, the parties entered into a certain agreement, the provisions of which, so far as material to an understanding of the controversy now before the court, are as follows:

"The American Fruit Product Company, of Rochester, N. Y. hereby agree to sell and deliver to Barrett & Barrett, on track at St. Paul, Minnesota, at such times as buyer may require during navigation of Western Transit Company's steamers, and order its shipments prior to October 1st, 1907, four thousand (4,000) whiskey barrels of pure cider vinegar in carload lots of not less than seventy-five barrels each, at thirteen (13) cents per gallon, barrels included. * * * Barrett & Barrett hereby agree to order, receive, and pay for the above-mentioned cider vinegar in accordance with the price and terms stated."

Pursuant to this contract defendant ordered from plaintiff prior to October 1, 1907, a number of the barrels agreed to be sold, and plaintiff shipped the same in accordance with the order. The vinegar so ordered amounted in value, according to the prices set forth in the contract, to the sum of $7,193.54, of which sum defendant has paid $5,293.02, leaving a balance still due to plaintiff of $1,900.52. The present action was brought to recover this balance.

Defendant interposed in defense that there was a mutual mistake of fact in the terms of the contract and of the legal effect of the language thereof, and demanded that it be reformed and made to conform to the intention of the parties. Defendant pleaded in this connection that it was understood and agreed by and between the parties, at the time the contract was signed, that defendant was not

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required to order the vinegar prior to October 1, 1907, as the contract reads, but that it might be ordered at any time prior to the close of navigation on the Great Lakes, and that the contract was signed by defendant upon the faith of representations of plaintiff's agent, who negotiated the sale, that such was its proper interpretation. The answer further alleges that on October 1, 1907, defendant ordered the balance of the vinegar, and that plaintiff refused to deliver the same, because not ordered prior to October 1, as required by the terms of the contract. The market price of vinegar had materially advanced in the meantime, and defendant alleges that the refusal of plaintiff to fill the last order resulted in its damage in the amount stated in the answer. The prayer for relief was that the contract be reformed and corrected, and that defendant have and recover of plaintiff the damages sustained by it. The allegations of the answer were put in issue by the reply.

After a trial of the issues before the court without a jury, the court found, in addition to the facts heretofore stated, the following: "On the day plaintiff and defendant executed the contract, * * * but prior to the execution thereof, defendant, upon reading the form of said contract presented to him by plaintiff's agent, objected to the clause therein requiring it to order its shipments prior to October 1, 1907, and refused to sign said contract with said clause therein, whereupon Bernard J. Flynn, the agent of plaintiff to procure contracts for the sale of its products, * * * stated to defendant's president who was then and there acting on behalf of defendant, that notwithstanding said clause plaintiff would ship all vinegar called for by said contract if ordered by [defendant] at any time before or after October 1, 1907, * * * providing [defendant] ordered said shipments prior to the close of navigation in that year. Said Flynn also stated that this was what the contract meant, notwithstanding said clause, but that he had no authority to make the written contract read otherwise than it did. Defendant believed the statements of said Flynn as to what plaintiff would do, as above stated; * * * and in reliance thereon signed said contract. Defendant knew at all times the exact language of said contract be-

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fore he signed the same, and knew the meaning and legal effect of said language."

As conclusions of law the court found that defendant was not entitled to a reformation of the contract, and judgment was ordered for plaintiff for the balance claimed to be due as heretofore stated. Defendant thereafter moved for a new trial, and appealed from an order denying it.

It is contended by defendant that there was either a mutual mistake as to the legal effect of the language used in the contract, or that defendant's manager was alone mistaken as to its legal effect, and was induced to sign the same by means of the inequitable conduct of plaintiff's agent. No fraud is claimed. All the assignments of error, save one, are directed to this one question, and do not require separate consideration.

The assignment challenging a ruling excluding certain evidence is not well taken. The evidence there offered, had it been received, would change in no essential respect the question involved, namely, whether defendant has a right, on the facts disclosed by the record, to a reformation of the contract. The language of the contract is plain and unambiguous, and required defendant to order such vinegar as it intended to take thereunder before October 1, 1907. This stipulation was incorporated in the contract with the knowledge of both parties, and there is no basis for the claim that it was inserted therein through mistake, mutual or otherwise. So that there can be no reformation on the theory of mutual mistake of fact.

But it is further contended by defendant that the record shows a mistake on its part respecting the legal effect of the contract as written, and also inequitable conduct on the part of plaintiff, and that for this reason reformation should be decreed. It may be conceded that the mistake of one of the parties to a written contract as to its legal effect, with inequitable conduct on the part of the other contracting party, is sufficient to justify equitable relief. Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. 816; 34 Cyc. 920. And the question presented is whether this case comes within the rule.

Counsel for defendant presented this feature of the case with much

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ingenuity, but reflection and a careful examination of the record precludes concurrence in his contention. The facts do not bring the case within the rule stated. The contract is clear and specific that orders should be made before the first of October, 1907, and defendant's manager, immediately upon discovering this condition, appreciated its force and effect, and refused to sign the same unless the clause was stricken out. He, however, yielded his assent upon assurances of plaintiff's agent that orders might be sent in after that date, if received during the season of navigation, and the further representation that such was the effect of the contract. In reliance upon these representations, the manager of defendant signed the contract. In connection with the statements made by plaintiff's agent, defendant was also informed that the agent had no authority to write the contract otherwise, or to change the time within which orders should be made. While this fact was disputed upon the trial, the trial court found that defendant was so informed, and our examination of the record discloses sufficient evidence to sustain the finding.

The provisions of the contract having reference to the time of shipment, namely, during the navigation season, do not render the contract uncertain in respect to the date specifically named within which orders for the vinegar should be made. Those provisions have to do only with the time and manner of shipment and transportation, and in no proper sense modify or even cloud the intention of the writing in other respects. The trial court found that defendant's manager "knew at all times the exact language" of the contract before he signed the same, "and knew the meaning and legal effect of said language." We have, then, a case where a written contract, couched in plain and unambiguous language, containing a definite and specific condition, is, without fraud or deception, signed by one of the parties thereto with full knowledge of all the terms of the writing, upon the contemporaneous verbal assurance of the agent of the other contracting party that the contract will not be enforced as written. Under such circumstances it seems quite clear that reformation cannot be had. Smith v. Rust, 112 Ill. App. 84; Brintnall v. Briggs, 87 Iowa, 538, 54 N. W. 531; Sanford v. Gates, 21

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Mont. 277, 53 Pac. 749; Wilson v. Deen, 74 N. Y. 531; Olmstead v. Michels (C. C.) 36 Fed. 455, 1 L.R.A. 840.

The statement of plaintiff's agent that the contract would not be enforced with respect to time was not, even though defendant relied thereon, inequitable conduct entitling defendant to relief. Inequitable conduct, as applied to cases of this character, consists in doing acts, or omitting things, or the making of representations, tending naturally to deceive as to the true interpretation of the contract, which the court finds to be unconscionable. 34 Cyc. 920. Such is not the case at bar. No fraud is charged, and defendant cannot be heard to claim that its manager signed the contract under the belief that the provision that orders should be made before October first meant that an order could be made after that date. The whole transaction amounts to nothing more than a verbal agreement on the part of plaintiff's agent to the effect that orders sent in subsequent to that date would be filled by the plaintiff; and defendant executed the contract with full knowledge that the writing did not so provide.

Our conclusion, therefore, is that the findings and rulings of the trial court were in harmony with the rules of law controlling the case, and the order appealed from is affirmed.

UNITED STATES & CANADA LAND COMPANY v. THOMAS F. SULLIVAN and Another.[1]

December 16, 1910.

Nos. 16,820—(122).

Lien on stock of corporation.

Section 2863, R. L. 1905, providing that stock shall not be transferred upon the books of a corporation while any indebtedness of the record holder

[1]Reported in 128 N. W. 1112.

[Note] Restrictions on right to sell shares of stock, see note in 27 L.R.A. 271.

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thereof to the corporation remains unpaid, *held* to create a lien upon the stock in favor of the corporation.

Revision of statutes — effect of change of wording.

A change in the language or phraseology of statutes in a general revision thereof does not necessarily indicate an intention on the part of the legislature to depart from or to modify, in point of substance, the previously existing law.

Same.

Such change of language is ordinarily to be ascribed to a purpose to condense and simplify the new statute.

Foreclosure of lien on stock.

The lien created by section 2863, R. L. 1905, may be foreclosed in equity.

Action in the district court for Hennepin county to foreclose an alleged lien upon fifty shares of capital stock for $6,825, and for $640, by a sale of the stock. Among other matters the complaint alleged that on or about June 5, 1906, defendant Sullivan purchased from one John Schwager and Alvin Schwager ninety-one shares of the capital stock of plaintiff corporation, and paid therefor the sum of $2,275 from the moneys of the corporation then in his hands; that on or about July 5, 1906, Sullivan sold the stock to James O'Laughlin for $9,100, and realized by this transaction a profit of $6,825; that Sullivan has never accounted to plaintiff for this sum; that on May 1, 1906, he conducted a party of land seekers to the Peace river region in Canada and without authority paid the railroad fare and other expenses out of the funds of plaintiff then in his hands, amounting to $640. Defendant Sullivan was not served and defendant Belcher demurred to the complaint. From an order, Holt, J., overruling the demurrer, defendant Belcher appealed. Affirmed.

William B. Anderson, Harris Richardson and *Harold C. Kerr,* for appellant.

William H. Hallam, for respondent.

Brown, J.

The short facts in this case, as appear from the allegations of the complaint, are as follows: Plaintiff is a corporation duly created and

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existing under the laws of the state. Defendant Sullivan was for a time the treasurer and a member of its board of directors, and the owner and holder of fifty shares of its capital stock. He is indebted to the corporation in an amount exceeding $6,000, which he has refused or neglects to pay. The corporation brought this action to recover the amount so due, and prays that it recover the same, and that the judgment therefor be declared a first lien upon Sullivan's stock, and that the stock be sold under the directions of the court, or sufficient thereof to satisfy its claim. The complaint also alleges that defendant Belcher claims some interest in or to the Sullivan stock, which claim it alleges is subsequent and inferior to the asserted lien of the corporation. Defendant Belcher interposed a general demurrer to the complaint, which sets forth in greater detail the facts stated, and appealed from an order overruling the same.

Counsel for defendant present in support of the demurrer two questions: (1) Has a corporation, under the provisions of section 2863, R. L. 1905, a lien upon the stock issued by it as security for the payment of any indebtedness due it from the record owner? (2) If it has such a lien, may it be foreclosed in equity, or is it a mere right on the part of the corporation to refuse to transfer a sale thereof upon its books, and analogous to the right of possession and detention incident to the ordinary common-law lien upon personal property? We answer both questions adversely to the contention of defendant.

1. The statute controlling the question (section 2863, R. L. 1905) provides: "Stock shall not be transferred upon the books of the corporation while any instalment thereon remains delinquent, nor while any indebtedness of the record holder thereof to the corporation remains unpaid." It is the contention of defendant that this does not create a lien in favor of the corporation, but only vests it with authority to refuse a transfer of stock until any existing indebtedness to it is discharged.

Prior to the revision of 1905, the statutes (section 2799, G. S. 1894) gave the corporation, in express terms, a lien upon stock issued by it as security for any indebtedness of the record holder, and provided for its foreclosure by a sale thereof after notice given in the

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manner there prescribed. By the revision the express provisions for a lien and the foreclosure were dropped, and the revised statute adopted in the language above quoted. For the purpose of comparison we set out the former statute. "The stock of any such corporation shall be deemed personal property and be transferable only on the books of such corporation in such form as the directors prescribe, and such corporation shall at all times have a lien upon the stock or property of its members invested therein for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided for selling delinquent stock."

Counsel contends that this change in the language of the statute indicates clearly an intention on the part of the legislature to modify the law and to take away the previously existing rights. There is force to the contention; but a comparison of the revised act with statutes of other states embodying similar language, where the claim of lien has been sustained, together with the views of the revision commission to the effect that no change in the law was intended, reference to which may be had for the purposes of interpretation, leads to the conclusion that it was not the intention of the legislature to make so radical a change in the law. In their report to the legislature the commission in reference to the statutes upon the subject of corporations said (p. 24): "In all cases our purpose has been, without attempting to change the law in any essential particular, to arrange it logically, dispensing with unnecessary verbiage, which tends only to confusion."

The legislature had this report before it when considering the revised statute, and was undoubtedly guided thereby, at least to some extent, in its enactment. The corporation lien had existed under the old statutes for some time, and there is no apparent reason for concluding that there was an intention to take it away, though it must be conceded that a substantial change was made by the elimination of the right of foreclosure as provided for by the previous statute. But there was every reason for striking that provision out. It authorized the summary foreclosure of the lien by a substituted service of notice, a proceeding subject to abuse. By omitting it in

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the revision the corporation was left free to resort to such other methods for the enforcement of its claim as are consistent with the general principles of law applicable to the enforcement of like claims. The purpose of the commission was to reduce the great mass of corporation statutes to compact form, using no more language than was necessary to give clear and unambiguous expression to rights granted and liabilities imposed. Statutes for all practical purposes similar to our revised statute the courts of other states have construed as creating a lien in favor of the corporation. Cook, Corp. (6th Ed.) § 525; Kenton v. Bowman, 84 Ky. 430, 1 S. W. 717; Farmers' Bank of Maryland's Case, 2 Bland (Md.) 394; Farmers v. Haney, 87 Iowa, 101, 106, 54 N. W. 61; White River v. Capital, 77 Vt. 123, 59 Atl. 197, 107 Am. St. 754; National v. Rochester, 172 Pa. St. 614, 33 Atl. 748. Our examination of the reports discloses a general trend of decisions in harmony with those cited. Note to Dempster v. Downs (126 Iowa, 80) 3 Am. & Eng. An. Cas. 188.

The commission had this general rule in mind, and were undoubtedly of the opinion that the language of the revised statute was sufficient to create and vest in the corporation a lien for the protection of its interests, and adopted it in that view with no intention of changing the law. There is no presumption that a change was intended; in fact, the presumption is to the contrary. 36 Cyc. 1067, and cases cited. And though a change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended, such a change is not ordinarily or necessarily of particular significance in the case of a general revision or codification, for the new language may be attributed to a desire to condense and simplify the law. 36 Cyc. 1165, 1166. We therefore hold that there was no intention to alter the law upon this subject, and that the statute now in force is sufficient to create a lien in favor of the corporation.

2. Whether a lien created by statute, with no provision for its enforcement, may be foreclosed in equity is a question upon which the authorities are, perhaps, not in harmony, though the weight of opinion sustains the jurisdiction. A corporation lien upon its stock is substantially dissimilar to the common-law lien upon articles of

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personal property, the existence of which is the right to the possession and the actual detention of the property until the indebtedness is paid. In the case of a lien upon corporate stock, neither the right of nor the possession itself is given the corporation. The certificates of stock constitute the property, and may be transferred from hand to hand, by proper indorsement, though a transfer upon the books of the corporation cannot be compelled until the lien of the corporation is discharged. Yet for all practical purposes the property in the stock passes upon assignment. Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. 623. If the sole remedy of the corporation to enforce its rights be limited to a refusal to transfer a sale upon its books, then the lien is without substantial substance, and the corporation practically remediless. The statute gives a valuable right, and there should be a remedy for its enforcement; for a right without a remedy is an anomaly in the law. Many of the courts where the question has been presented have affirmatively held that a foreclosure may be had in equity. Cook, Corp. (6th Ed.) 530; McIlroy v. Dickson, 66 Ark. 327, 50 S. W. 868; Cairo v. Fackney, 78 Ill. 116, 120; Tete v. Farmers, 4 Brewst. (Pa.) 308; German v. Kentucky (Ky.) 40 S. W. 458; Wright v. Hixon, 105 Wis. 153, 80 N. W. 1110, 1135; Gilchrist v. Helena Hot Springs & Smelter R. Co. (C. C.) 58 Fed. 708.

But the equitable jurisdiction of the court for the enforcement of statutory or other liens, even in the presence of a remedy at law by foreclosure, would seem to be settled in this state by the decision in Forepaugh v. Pryor, 30 Minn. 35, 14 N. W. 61. It was there held that an action may be maintained to foreclose a chattel mortgage, notwithstanding the fact that the mortgage contained a power of sale. No distinction on principle can be made between that case and the one at bar. There was in that case a lien by contract and also by statute. Here the lien exists solely by statute, with no method for its enforcement provided by the law of its creation. We hold, therefore, that it may be foreclosed in equity. The authorities sustain this view. See note to Aldine v. Phillips (118 Mich. 162) 74 Am. St. 387.

Order affirmed.

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CITY WATER POWER COMPANY v. CITY OF FERGUS FALLS.[1]

December 16, 1910.

Nos. 16,836—(121).

Dam in natural watercourse — owner not an insurer of its safety.

Action by a lower riparian owner for damages caused by the destruction of his milldam by the breaking of the dam of an upper owner. *Held:*

1. The erection and maintenance of a dam across a natural watercourse for the purpose of utilizing a water power is not a nuisance, nor is the owner thereof an insurer of its safety, but he is bound to exercise in the premises a degree of care proportionate to the injuries likely to result to others if it proves insufficient. The dam must be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated. Wiltse v. City of Red Wing, 99 Minn. 255, distinguished.

2. The maxim res ipsa loquitur applies to the facts alleged in the complaint, but it is a rule of evidence, not of pleading, and it cannot supply an allegation of an essential ultimate fact.

Action in the district court for Otter Tail county to recover $6,158.80 damages sustained on account of the giving way of a certain dam, whereby plaintiff's dam, located down stream, was partially washed away and destroyed. The substance of the complaint is stated in the opinion. From an order, Taylor, J., overruling defendant's demurrer to the complaint, it appealed. Reversed and remanded, with leave to plaintiff to apply to the trial court to amend the complaint.

N. F. Field, for appellant.

J. W. Mason, for respondent.

START, C. J.

Appeal by the defendant from an order of the district court of the county of Otter Tail overruling its general demurrer to the complaint. The here material facts alleged in the complaint, briefly

[1]Reported in 128 N. W. 817.

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stated, are these: The defendant is a municipal corporation with power to furnish light for all municipal purposes, and to supply light to the inhabitants of the city for profit. In the execution of this power, and for its profit it built and maintained upon its own land and across the Red river a dam for the purpose of creating the necessary water power. This dam was located up the river one and one-half miles above a dam which the plaintiff built and maintained on its own land and across the river. The water in the river could be raised by the defendant's dam to the height of thirty feet, and was so raised, whereby a great reservoir of water, a mile long and thirty rods wide, was created and confined within the banks of the river. The water so collected and confined by the dam in the reservoir did not naturally belong there, and its natural tendency was to do great damage and mischief if it escaped. On the twenty-fourth day of September, 1909, the dam of the defendant, in consequence of the great pressure of the water in the reservoir above it, suddenly and without previous warning gave way, and thereby all the water contained therein escaped, and in a great flood rushed down the river upon and over the dam of plaintiff, whereby a great portion of it was destroyed, to plaintiff's damage in the sum of $5,697.43.

The learned trial judge stated his reason for overruling the demurrer in these words: "Even if, as defendant claims, the rule of absolute liability established by Cahill v. Eastman, 18 Minn. 292 [324], Knapheide v. Eastman, 20 Minn. 432 [478], Berger v. Minneapolis Gaslight Co., 60 Minn. 296 [62 N. W. 336] and Wiltse v. City of Red Wing, 99 Minn. 255 [109 N. W. 114] does not apply, I think the complaint brings the case within the rule res ipsa loquitur, as established in Waller v. Ross, 100 Minn. 7 [110 N. W. 252, 12 L.R.A.(N.S.) 721, 117 Am. St. 661], and Gould v. Winona Gas Co., 100 Minn. 258 [111 N. W. 254], and the numerous cases cited in those decisions."

1. The first question presented by the record is whether the rule of liability without proof of negligence held in the cases cited by the trial court applies to the facts admitted by the demurrer.

The rule was applied in the case of Wiltse v. City of Red Wing, supra. The facts in that case were that the defendant city construct-

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ed on the side of a bluff one hundred fifty feet above plaintiff's house a reservoir, and pumped into it water from the river, and stored therein eight hundred thousand gallons of water for use in connection with its system of waterworks. The reservoir gave way and the water was thrown upon the house, whereby it was destroyed. We held upon these facts, following the previous decisions of this court, that the city was liable for the resulting damages without proof of negligence on its part in the construction and maintenance of the reservoir.

The doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330, was first adopted and applied by this court in the case of Cahill v. Eastman, 18 Minn. 292 (324), 10 Am. Rep. 184, and in the Wiltse case we refused, on the ground of stare decisis, to overrule the former decisions. While an examination of the judicial decisions of other jurisdictions seems to indicate that the rule of Rylands v. Fletcher has been rejected as unsound in the majority of the states, yet we are not prepared to overrule our own decisions on the question. Nevertheless we are of the opinion that the rule ought not to be extended to cases not clearly within its reason.

We have, then, the question whether the rule ought to be extended to the case of the construction and maintenance by riparian owners of dams across natural watercourses for the purpose of utilizing water powers, a matter of great and increasing importance to public as well as to private interests. Such a use of the water of rivers and lesser streams is not an unnatural or unusual use, but the contrary. Nor does such use involve the bringing upon the owner's premises that which does not naturally belong there, nor the creation and maintenance of a nuisance, the existence of which fixes liability without proof of actual negligence. The legislature as early as 1857 (P. S. 1849–1858, c. 129) recognized the public benefit to result from a development of the water powers of the state by enacting a statute "to encourage the erection of milldams and mills" by authorizing their construction and giving the owners of water powers the right to exercise the power of eminent domain to secure the necessary land for flowage. This statute is still in force. R. L. 1905, c. 42. The constitutionality of the statute was sustained in

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the case of Miller v. Troost, 14 Minn. 282 (365). In the case at bar both the plaintiff and defendant had a right as riparian owners to build their respective dams across the stream. Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41. In so doing each exercised a lawful right, the exercise of which was a substantial public benefit.

On principle it is clear that the rule of absolute liability ought not to be extended to milldams lawfully constructed and maintained without any negligence in fact. Such is the rule in other jurisdictions, notably in Massachusetts, although the rule of Rylands v. Fletcher is there accepted. Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Wilson v. City of New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Mears v. Dole, 135 Mass. 508. In these cases the rule of Rylands v. Fletcher was recognized and applied, but in the cases of Inhabitants of Shrewsbury v. Smith, 12 Cush. (Mass.) 177, and Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61, which were milldam cases, it was held that negligence in fact was the test of liability of an owner of a milldam for damages caused by the breaking of his dam. These cases, however, impose upon the owner of the dam a high degree of care in these words:

"It must be in proportion to the extent of the injury which will be likely to third persons provided it should prove insufficient. And it is not enough that the dam be sufficient to resist ordinary floods; for, if the stream is occasionally subject to great freshets, those must likewise be guarded against, and the measure of care required in such cases must be that which a discreet person would use if the whole were his own. * * * The dam should be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may be reasonably anticipated."

This court in the case of Gould v. Winona Gas Co., 100 Minn. 258, 111 N. W. 254, 10 L.R.A.(N.S.) 889, declined to extend the rule of absolute liability to gas collected in the mains of the defendant which escaped, whereby plaintiff's premises were damaged. We have been unable to find any case where the rule of absolute liability has been extended to milldams constructed in natural watercourses. This suggests the distinction between the Wiltse case and the one at bar. In the former case the conditions were wholly artificial. The

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water was brought by artificial means upon the defendant's premises, where it did not naturally belong, and stored in an artificial reservoir upon the side of a high bluff, a menace to the safety of property below it lawfully. These are conditions not strictly analogous to those in the case at bar, where the waters of a natural watercourse were impounded within its banks in the usual and natural way for a public as well as a private purpose. See, in this connection, 3 Farnham, Waters & Water Rights, §§ 875, 982.

We accordingly hold that the erection and maintenance of a dam in a natural watercourse by a riparian owner for the purpose of utilizing a water power is not a nuisance, and that the owner thereof is not an insurer of its safety, but he is bound to exercise, in its construction and maintenance, a degree of care proportionate to the injuries likely to result to others if it proves insufficient.

2. This brings us to the question whether the maxim res ipsa loquitur applies to the facts alleged in the complaint. We are of the opinion that it does. The dam, its construction, and its maintenance were within the exclusive possession and control of the defendant or its agents. Dams constructed and maintained with the care required by law do not in the ordinary course of things break by the pressure of the water held back by them. The very purpose of constructing them is to impound the water of the stream. Waller v. Ross, 100 Minn. 7, 110 N. W. 252, 12 L.R.A.(N.S.) 721, 117 Am. St. 661; Gould v. Winona Gas Co., supra. The maxim, however, is a rule of evidence, not of pleading, and ultimate facts, not evidentiary ones, should be pleaded. On the other hand, it is true that proof of the fact alleged in the complaint in this case would establish a prima facie case in favor of the plaintiff, for the inference of facts from the facts pleaded would be that the defendant failed to use due care in the premises, hence it was negligent. It would be, from the very nature of this case, a great hardship, if not an impossibility, for the plaintiff to affirmatively allege and prove the particular negligence in the construction and maintenance of the dam; but, on the other hand, the defendant knows presumably just how it was constructed and maintained. In any event, a general allegation of negligence in such respects would be sufficient. Olson

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v. St. Paul, M. & M. Ry. Co., 34 Minn. 477, 26 N. W. 605; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688.

We have reached the conclusion that the complaint should have alleged in general terms, at least, the ultimate fact of the negligence of the defendant in the premises, for the inference of negligence from the evidentiary facts pleaded is not a presumption of law, but a rebuttable inference of fact. It is only where the evidentiary facts pleaded are such that the conclusion of the ultimate fact necessary to sustain the action inevitably follows that such a pleading can be sustained. Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139.

Order reversed and cause remanded, with leave to the plaintiff to apply to the trial court to amend the complaint.

GAMBLE-ROBINSON COMPANY v. MASSACHUSETTS BONDING & INSURANCE COMPANY.[1]

December 16, 1910.

Nos. 16,861—(111).

Fidelity insurance — unreasonable delay in giving notice of dishonesty.

Appellant was informed by the written cash reports of its employee, a traveling salesman, that he was indebted to the company in the sum of $553.21, and received from him $25 on account, with the statement that there were credits and discounts due him sufficient to balance the account. During the succeeding three weeks appellant caused the books to be checked up and the accounts of the customers to be examined, to determine the correctness of his report and the existence of the discounts and credits claimed; but for the period of four weeks thereafter nothing special was done in that direction. The employee continued in appellant's employment in another locality, and made three payments of $25 each out of his own salary to apply on his account. It was then discovered that he had collected an account which had never been reported, and he was discharged, and the bonding company notified of the shortage.

In an action against the respondent bonding company to recover the

[1]Reported in 129 N. W. 131.

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amount of the shortage, *held*, that the delay to notify respondent of the facts was unreasonable, and not in accordance with the provisions of the bond, which provided that the insurer should indemnify the employer for pecuniary loss sustained by reason of the fraud or dishonesty of the employee, and required that upon discovery of any act of fraud or dishonesty the employer should immediately give notice thereof to the bonding company.

Action in the municipal court of Minneapolis to recover upon defendant's indemnity bond the sum of $499, alleged to have been embezzled by plaintiff's traveling salesman. The complaint alleged that plaintiff had performed all the conditions of the bond on its part, and attached a copy of the bond to its complaint.

The answer alleged that if any loss were sustained by plaintiff by reason of the dishonesty or fraud of Frisbee which amounted to either embezzlement or larceny, it occurred prior to August 3, 1908, of which plaintiff had knowledge on or about that day, and that plaintiff knew of said acts of dishonesty on September 7, 10, 27, and at all times between August 3 and September 27; and that on September 7 plaintiff made a settlement with Frisbee for any loss covered by the bond, without defendant's consent, and that at that time plaintiff condoned an act for which defendant might have been liable; that this was also done on September 17 and 27; that plaintiff did not, upon discovery of the fraud, immediately give defendant notice thereof; that plaintiff did not give in writing to defendant full particulars of any claim made under the bond within sixty days after discovery of the fraud.

The case was tried before Waite, J., who directed a verdict in favor of defendant. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

Walter Holsinger, for appellant.

Brown, Albert & Guesmer, for respondent.

LEWIS, J.

The Gamble-Robinson Company was a corporation engaged in the fruit commission business at Minneapolis. Appellant, Gamble-Robinson Company, was an associate corporation engaged in the same business at Rochester, Minnesota; the officers of both corporations

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being identical, all residing at Minneapolis. This action was brought to recover $499 from the respondent, claimed to be the amount of shortage in an account of an employee, W. J. Frisbee. The surety bond provided as follows:

"At the expiration of three months next after proof satisfactory to the company, as hereinafter mentioned, make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employees named upon said schedule, or added thereto as hereinafter provided in connection with his duties as specified on said schedule, amounting to embezzlement or larceny: * * *

"Provided, that on the discovery of any such fraud or dishonesty as aforesaid on the part of any employee, the employer shall immediately give notice thereof to the company, and that full particulars of any claim made under this bond shall be given in writing addressed to the company, at its office in the city of Boston, Mass., within sixty days after such discovery as aforesaid * * *

"If the employer shall fail to notify the company of the occurrence of any act of dishonesty on the part of any of the employees as soon as it shall have come to the knowledge of the employer, or shall continue to intrust the employee with money or valuable property after such discovery, or makes any settlement with the employee for any loss hereunder without the consent of the company, or condones any act for which the company may be liable, then the company shall be discharged from any and all liability under this bond as to such employees."

At the close of the trial the court directed a verdict for respondent, upon the ground that appellant had failed to notify respondent, within a reasonable time after its knowledge, of the acts of dishonesty which Frisbee had been guilty of.

The rules of law governing such cases have been stated as follows: "The general rule is that the question of reasonable time is one of fact, and must be submitted to the jury with proper instructions; but when the facts are undisputed, and only one reasonable conclusion can be drawn therefrom, it is the duty of the trial judge to instruct the jury accordingly." George A. Hormel & Co. v. American

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Bonding Co., 112 Minn. 288, 128 N. W. 12. If a bond is fairly and reasonably susceptible of two constructions, one favorable to the insured and the other to the insurer, if consistent with the objects for which the bond was given, that construction favorable to the insured must be adopted. Though the insured may have had suspicions of irregularities, or fraud, he is not bound to assume that an employee is guilty of acts of dishonesty until he has acquired the knowledge of such specific fraudulent or dishonest acts as might involve the insurer in liability for misconduct. American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. ed. 977. The object of giving such a notice is to enable the insurer to take steps for its protection, and what is a reasonable time and what constitutes knowledge depends, of course, entirely upon the circumstances of each particular case. The object of such a bond is to indemnify the insured against loss arising from any act of fraud or dishonesty on the part of employees, and such object should not be defeated by any narrow interpretation of its provisions. But this rule should not be availed of to refine away the terms of the contract expressed with sufficient clearness to convey the plain meaning of the parties. Guarantee Co. v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. ed. 253.

Mr. Frisbee had been employed by the Rochester Company for about a year prior to August 3, 1909, as a traveling salesman and collector at a salary of $90 per month, and his territory was in northern Iowa and southern Minnesota. On the third of August his territory was changed to Minneapolis, and he came directly under the supervision of the Minneapolis house. It had been Mr. Frisbee's custom to collect accounts and to make daily reports to the Rochester house of the amount of his collections and credits. When called to Minneapolis on August 3, he presented a cash report to the president, which showed upon its face a cash balance of $553.21; but he turned over only $25 in cash.

Mr. Robinson, the secretary and treasurer, testified as follows as to what took place: "Monday morning, I should say about 9 o'clock, August 3d, I met Mr. Frisbee in a small private office of Mr. Gamble's. * * * I was going by that office on the stairway, and I saw

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Mr. D. F. Gamble and Mr. Frisbee standing there talking, and I stepped in. Mr. Gamble handed me a cash report signed by Mr. Frisbee, and called my attention to it, and said, 'What do you think of this?' or words something like that, and I picked it up and looked at it, and I saw that it was a cash report signed by Mr. Frisbee, covering the collections at Rochester, and there was a balance of five hundred and fifty some dollars, and that there was no money with the report to offset that balance. I made some exclamation of surprise. I don't remember now just what I said—somewhat surprised—and Mr. Frisbee spoke up and says, 'That looks bad.' But he says, 'That is not the way it looks.' He says, 'I don't owe the house that amount.' He says, 'There are credits for discounts allowed and allowances made customers and merchandise that should be credited that I have reported that the house has not credited to these customers, which will probably offset that.' Q. Yes, sir; and what did you say? A. I didn't say very much. I don't know as I said anything at that time, except that I made some mention that we would have it checked up and see whether it was right or not."

Mr. Robinson further testified that Mr. Frisbee had been distributing cars of goods through the spring and summer and might have been inaccurate in the report he made to the house, which, of course, would have affected his balance. Mr. D. F. Gamble, the treasurer, testified as follows: "A. Mr. Frisbee came in in a hurry and puffing, and said he had only a few minutes to make a train, and handed in a statement covering his reports at Rochester, and I talked with him perhaps a couple of minutes before Mr. Robinson came down. Q. What did he say to you? A. His first statement to me was, 'Here is a statement showing my balance due Rochester,' and I looked at it half a minute, and I was surprised to see a statement of that kind, and said so to him. He says, 'Mr. Gamble, those figures show there is that much due Rochester, but in reality is not true, because there are a good many credits for allowances, discounts, and shortages which my customers haven't had credit for,' and he says, 'I doubt if I owe the house in Rochester anything after everything is checked up.'"

Mr. Robinson immediately telephoned to the Rochester house to

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check up Frisbee's account, which was done by the bookkeeper in charge, and a man was then sent out over Mr. Frisbee's territory to check up his accounts with the customers. This man covered only part of the territory, and came back within a week, and reported Frisbee's acts confused, but that no amount was found collected which had not been reported. A second man was sent out, who covered a part of the territory, and he came back with a similar report. No other special party was sent out, but a salesman and collector was kept in the regular business, and nothing further was done to investigate Frisbee's accounts until September 28 following, when it was found out that an account not mentioned in any of his cash reports had been collected by Frisbee. This fact was communicated to the Minneapolis house, and Frisbee was at once discharged, and the bonding company notified of the shortage. During all this time Frisbee continued in the employ of the Minneapolis house. It appears, however, that during that time he paid out of his salary to the house the sum of $75, as follows: September 7, $25; September 10, $25; and September 27, $25. The first cash report in evidence, that of July 11, showed a cash balance on hand at the time of his previous report of $51.77, and a total amount due of $80.30. The July 17 report showed this amount, $80.30, due at the date of the last report, and a total of $79.34 due July 17. The July twenty-third report showed a total amount due of $89.45, and the July twenty-fifth report stated that the cash on hand July 23 was $89.45, and showed a balance due July 25 of $74.79. An examination of the cash report dated August 3 discloses that the total amount of money received by Frisbee during the time covered by it was $862.28, and the total amount of the credits was $309.07, leaving a balance due the house of $553.21. This report covered five days, from July 25 to August 1, and showed that the amounts had been collected from sixteen customers in northern Iowa and southern Minnesota.

The trial court made a critical analysis of this report, and attached great importance to the evidence appearing on its face. Evidently Messrs. Gamble and Robinson had no reason to believe that the credits claimed by Frisbee grew out of the transactions in connection with the sixteen customers referred to in his last report,

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and if they believed his statement that there were such credits they must have known that they grew out of prior transactions which had not been reported, and that his previous reports had been incorrect and misleading, if not untrue. It may be assumed that their conduct immediately succeeding the third of August was consistent with a belief that the shortage grew out of some excusable mistakes, and that they were justified in taking steps to have the books checked up and Frisbee's accounts examined for the purpose of adjusting the discrepancy.

But it is impossible to reconcile their conduct subsequent to the month of August with a sincere belief in Frisbee's innocence. The books had been checked up and no mistakes discovered. Two men had been sent out for the purpose of making examination of the accounts with Frisbee's customers, and nothing definite had been ascertained. Then the matter was dropped, without any further effort to discover whether Frisbee was telling the truth or not. Frisbee himself recognized the shortage by making payment of $25 on September 7 and two such payments subsequently. The money was accepted, sent on to Rochester to be credited to his account, and yet the company took no further active steps to determine the true state of his affairs.

The bond under consideration in the Hormel case differed somewhat, and there was no question as to the time when the owner obtained knowledge of the facts he was required to report to the surety. In the present case the insured was required to report acts of dishonesty; that is, acts which should have satisfied the officers as reasonable men that Frisbee had been guilty of dishonesty. The object of requiring the notice was to enable the insurer to make investigations and to take the necessary steps to indemnify itself. After ascertaining the facts and being informed that there was a probable shortage, the plaintiff was required to give the notice within a reasonable time. The officers were bound to comply with the terms of the bond, and the delay until September 28 was inexplicable on any reasonable theory. The question of shortage had passed beyond mere suspicion. It was standing out as a probable fact, and there was no further ground for hesitancy. It was not necessary

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to brand Frisbee as a thief. All that plaintiff was required to do was to lay the facts before the insurer.

We are satisfied the delay was unreasonable, and that the trial court was correct in directing a verdict in favor of respondent.

Affirmed.

HELEN M. EVANS and Others v. BERNARD KOHN.[1]

December 16, 1910.

Nos. 16,934—(103).

Statutory action for waste — measure of damages.

In an action for waste under section 4447, R. L. 1905, in which treble damages may be allowed, the proper basis for damages is the depreciation in the value of the premises.

Conversion of trees or soil.

At least where possession is unlawfully or fraudulently obtained, and trees or soil severed from the premises and converted by the tenant, the title remains in the owner of the premises, and he may recover its value as enhanced by the labor of the wrongdoer.

Evidence — enhanced value of property converted.

In this case the evidence did not show the damages to the premises, but the allegations of the complaint, taken in connection with the testimony received without objection, justified an assessment of damages based upon the enhanced value of the property converted, not, however, for the amount awarded.

Action in the district court for Ramsey county to recover $2,900, treble damages for waste to certain real property; that defendant's estate in the property be forfeited and that he be evicted therefrom.

The answer admitted the execution of a lease on November 1, 1906, for the term of five years, subject to the right of plaintiffs in case of sale to terminate the lease with respect to the portion sold;

[1] Reported in 128 N. W. 1006.

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that by the terms of the lease it was agreed defendant should have possession of the premises for gardening or truck-farming, with the further privilege on defendant's part to take moulding-sand from the premises, provided the removal should not be conducted in such a way as to result in depreciation in the value of the premises; that defendant had carried away not to exceed fifteen carloads of sand; that defendant removed the sand in a careful manner and in such a way that the value of the land had been enhanced thereby. The reply was a general denial. The case was tried before Kelly, J., who made findings of fact and as conclusion of law ordered judgment in favor of plaintiffs for $1,000. From an order denying defendant's motion for a new trial, he appealed. Reversed, unless plaintiffs within twenty days from the filing of the remittitur consent in writing that the amount for which judgment may be entered be reduced to the sum of $656.25, and if such consent be filed the order be affirmed.

How, Butler & Mitchell, for appellant.

Orr, Stark & Collett, for respondents.

O'Brien, J.

Plaintiffs are the owners of certain real estate situated in the city of St. Paul. The premises are vacant, and in 1906 defendant obtained a lease thereof whereby he agreed to and did pay $35 for one year's rental, and $15 for five carloads of sand to be taken by him from the premises. Defendant retained constructive possession of the premises during several succeeding years under the lease or its renewal, and during that time took from the premises a considerable quantity of sand, amounting at least, as found by the court, to fifteen carloads over and above the five carloads originally authorized. Plaintiffs claimed that at the time of the execution of the lease it was represented to them by defendant that the sand which he desired to take was ordinary building sand for some specific building, but that, in fact, it was what is known as moulding sand, said to be more valuable, which fact defendant concealed.

The complaint alleged the leasing, the wrongful taking, and conversion of forty carloads, each containing thirty tons, of the value

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of $2.50 a ton, a lessening in value of the land in the sum of $500, and alleged, further, the value of the premises and plaintiffs' reversionary interest were impaired to plaintiffs' damage in the sum of $2,900, and demanded judgment for the forfeiture of defendant's estate, his eviction from the land, and for damages in treble the sum of $2,900. The court found the total value of the moulding sand converted by defendant to his own use was $1,000, and that because of spoliation the land was depreciated in value in the sum of $1,000, and as a conclusion judgment was ordered in favor of the plaintiffs for the sum of $1,000.

1. Counsel for defendant insist that this is strictly an action for waste against a tenant lawfully in possession, and that plaintiffs' damages must be measured by the depreciation in the value of the real estate, and that the value of the sand upon the market after its severance from the land, and after such value had been enhanced by defendant's labor, is not the proper measure. This claim might be true in ordinary actions for waste against one who was lawfully in possession of the property. Morris v. Knight, 14 Pa. Super. Ct. 324; Prudential v. Guild (N. J. Eq.) 64 Atl. 694; Cole v. Bickelhaupt, 64 App. Div. 6, 71 N. Y. Supp. 636; McCartney v. Titsworth, 119 App. Div. 547, 104 N. Y. Supp. 45. There is no doubt the complaint here states a cause of action for waste under section 4447, R. L. 1905, and, if judgment must be awarded under the provisions of that statute which authorizes treble damages, we think the position of defendant's counsel is sound, and the basis of such damages must be the injury to the premises.

The complaint, however, alleges the taking and conversion of a certain number of carloads of sand of a stated value, and evidence was received without objection which tended to show that the original leasing was merely a subterfuge for obtaining possession of the property for the unlawful purpose of digging and removing the moulding sand, [of] the existence of which the plaintiffs were ignorant, and, further, that this was stealthily carried on by defendant. Under such circumstances, we have no doubt the plaintiffs could recover from defendant the highest value of the sand while in his possession; that is, the rule applied to wilful trespassers would apply, and the

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title to the asported property remain in the owner of the land, who, if he sued in trover, could recover its value as enhanced by defendant's labor. Whitney v. Huntington, 34 Minn. 458, 26 N. W. 631, 57 Am. Rep. 68; Tiedeman, Real Property (3d Ed.) § 64; 4 Sutherland, Damages (3d Ed.) § 1034; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L.R.A. 694, 64 Am. St. 891; Isom v. Rex, 140 Cal. 678, 74 Pac. 294; Stone v. Knapp, 29 Vt. 501. The complaint alleging a cause of action under the statute, and evidence having been received without objection upon the claim of wrongful conversion of personal property, it follows that, if the evidence sustains the findings, a new trial was properly refused.

2. The court found the real estate to have been damaged in the amount of $1,000. The only evidence to support this finding was that given by the witness Benham, who expressed the opinion that the land would not sell for within $1,000 of the price it would have previously commanded. Upon cross-examination this witness refused to make a statement as to the value of the land, saying if he gave an estimate of it: "It would be merely a guess." If the witness had no opinion as to the value of the land, he could have no opinion as to the amount in which it was damaged, and we conclude, therefore, there was no testimony to support this finding of the court.

3. The testimony as to the amount of sand taken was extremely unsatisfactory. In a memorandum, made a part of the findings, the court said: "Defendant admitted having taken from the land and sold fifteen carloads of moulding sand. There was evidence tending to show that forty carloads were shipped from this vicinity to defendant's consignees. But, as the testimony indicated other places of supply in that vicinity, I am justified in finding that defendant converted of plaintiffs' property at least one thousand dollars worth." Under this statement, it must be held that the evidence sustained the taking of no more than fifteen carloads. The evidence showed each car contained from thirty to forty tons. Fifteen cars of thirty-five tons each amount to five hundred twenty-five tons. The only evidence as to the value of the sand which we have been able to find in the record was that given by the defendant, who testified that for

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some of the sand sold by him he received from $1 to $1.25 per ton. The highest of these prices would give the five hundred twenty-five tons a value of no more than $656.25. The evidence does not support a finding that sand of more than the value of $656.25 was taken by defendant from plaintiffs' premises.

The order denying a new trial is reversed, unless the plaintiffs within twenty days from the filing of the remittitur in the district court consent in writing that the amount for which judgment may be entered be reduced to the sum of $656.25, with interest from July 15, 1909, and if such consent be filed the order be affirmed.

WILLIAM F. OWENS v. CHICAGO GREAT WESTERN RAILROAD COMPANY[1]

December 16, 1910.

Nos. 16,943—(178).

Act of congress constitutional.

The act of congress, imposing upon interstate carriers liability to employees engaged in interstate commerce for injuries received through the negligence of coemployees, is valid.

Enforcement of right in state court.

A right arising under the federal constitution or laws may be enforced by the state courts.

Expert opinion on mechanical appliance.

A mechanical expert may give his opinion as to the cause of the particular operation of mechanical appliances, based upon a history of the circumstances and conditions surrounding the operation.

Verdict sustained by evidence.

Evidence considered, and *held* to sustain findings.

[1]Reported in 128 N. W. 1011.

[Note] Validity of statute abrogating fellow servant rule, see note in 12 L.R.A.(N.S.) 1040.

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Charge to jury.

The issue being whether the progress of a train was suddenly arrested by the act of the engineer, or the maloperation of the brake apparatus, it was not error to instruct the jury, if the sudden stoppage was unnecessarily made by the engineer, the plaintiff could recover.

Action in the district court for Ramsey county against the receivers of the Chicago Great Western Railway Company to recover $25,000 for personal injuries received in the state of Illinois by reason of the sudden stoppage of defendant's train, caused by the negligent acts of defendant's engineer. The answer alleged plaintiff's contributory negligence. At the trial defendant company was substituted for the receivers. The case was tried before Kelly, J., who, at the close of the trial denied defendant's motion to dismiss the action, because an attempt to enforce a federal statute in a state court. Its motion for a directed verdict, because of assumption of risk or contributory negligence, was denied. The jury returned a verdict in favor of plaintiff for $9,750. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Briggs, Thygeson, Loomis & Everall, for appellant.

Samuel A. Anderson and *A. F. Storey,* for respondent.

O'Brien, J.

Plaintiff was a conductor upon a freight train of defendant, which was engaged in interstate commerce. The train was partially made up in Chicago, and proceeded to Bellwood, where additional cars were added, and then went to South Elmhurst, all in the state of Illinois. For some distance after leaving Bellwood the train encountered an upgrade, the highest point of which was between that place and South Elmhurst. At the time of the accident complained of at least the forward part of the train had passed this highest point and was upon a slight downgrade. The train was to stop at South Elmhurst, but some one thousand feet sooner than intended, and while moving at from ten to twelve miles an hour, came to a sudden and violent stop, caused by the premature application of the full force of the air brakes. At the time this occurred the plaintiff was ascending a ladder upon the front end of the outside

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of the caboose, the jar broke his hold, and he was thrown under the wheels and severely and permanently injured.

It seems that such a stop could be produced by the engineer improperly applying what is known as the "emergency," which means the full force of the braking apparatus, and also that it may be produced by any one of several defects in the apparatus itself. Defendant contended that this stop was caused by a foul or sticky condition of some valve situated in the interior of the mechanism, and which could not be discovered by any ordinary inspection. All other causes, such as the breaking of the hose, were eliminated.

1. The pivotal question in the case was whether plaintiff established his claim that the sudden stop resulted solely from the improper manipulation of the brakes by the engineer.

It was conclusively shown that undesired quick action of the brakes was sometimes produced in the manner and from the causes claimed by defendant; but there was also testimony which tended to show that the manner of the stop occurring to this train differed from those caused by an imperfect or foul valve, and that the stop shown in this case could only have been produced by the engineer. The testimony fairly showed that, when a valve in the apparatus upon a car was in the condition described it often failed to respond to the first application. This is generally light, and for the purpose of gathering up the slack, bringing the brake shoes against the wheels, and to bring the train generally under control. The failure of the apparatus upon one car to respond does not, it appears, prevent the train being thus brought under control; but when the second application or reduction is made the unresponding valve is by the additional force compelled to act, and in doing so goes beyond the desired point, and opens additional ports, causing an emergency application of the brakes, and bringing the train to a sudden stop. It will be seen from this that the exact position of the train with reference to the top of the grade or "hill," the condition of the slack, the position of the brake shoes, and whether or not there had been a first or light reduction or application made, were all-important factors in determining whether the engineer was or was not at fault.

Without attempting to recite the evidence as to these conditions, it

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is sufficient to say it was conflicting, and, taken in connection with the evidence as to the tests and inspections made before and after the accident, made a case for the jury upon the question of the engineer's negligence, and that defendant's rights were fully protected by the following instruction: "The burden is upon the plaintiff to prove that this accident was caused by the improper act of the engineer in stopping the train, as it was claimed, in a sudden and unusual and violent manner. The defendant is not bound to prove the negative, but the plaintiff is bound to satisfy you that the train was stopped in that way by this engineer."

Counsel for defendant argue that, more than one cause having been shown which might have brought the train to a sudden stop, the jury were not at liberty to speculate which of these was the active agent in the maloperation of the brakes. This would be true, if there were no circumstances which pointed to one or the other of these as the probable cause. The jury were not compelled to accept as true the testimony of any witness, if conditions and circumstances proven to their satisfaction tended to contradict the direct testimony of such witness. This, taken in connection with the right of the jurors to determine the credibility of each witness, and their opportunity and that of the trial judge to observe the demeanor and manner of the witnesses, renders it impossible for this court to say the jury were not justified in finding the sudden stoppage was the result of the engineer's act in applying the brakes with improper force. Olson v. Great Northern Ry. Co., 68 Minn. 155, 71 N. W. 5.

2. There is no "fellow servant" statute in Illinois, where the accident happened; and plaintiff relies upon the federal act of April 22, 1908 (35 St. 65, c. 149 [U. S. Comp. St. Supp. 1909, p. 1171]), imposing liability upon interstate carriers for injuries sustained by their employees through the negligence of coemployees while engaged in interstate commerce. Defendant attacks this act as being beyond the power of congress, in that it is not a regulation of commerce. We think this act of congress must be held valid, under the reasoning of the federal supreme court in Howard v. Illinois Central R. Co., 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297, and Watson v. St. Louis I. M. & S. Ry. Co. (C. C.) 169 Fed. 942.

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3. But, it is claimed, even if a valid exercise of federal authority, the state courts are without power or jurisdiction to enforce this act of congress. It is well settled that, when the parties are properly before it, a state court will enforce any right which one has by virtue of the federal constitution or laws. Endres v. First Nat. Bank of Breckenridge, 66 Minn. 257, 68 N. W. 1092; Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. ed. 542; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833. The amendment of April 5, 1910 (36 St. 291, c. 143), giving the state courts concurrent jurisdiction, and forbidding the removal of cases arising under the law, adds nothing to the jurisdiction of the state courts; its effect being only as to the right of removing to the federal courts actions brought in the state courts.

4. Certain witnesses for plaintiff were permitted in spite of objection to give their opinion, based upon the assumption of the truth of plaintiff's testimony, that the sudden stop was caused by the engineer's making an excessive reduction, or, as we would express it, an unnecessarily severe application, of the brakes. There is no doubt of the rule that ordinarily a witness may not be permitted to express an opinion as to the ultimate fact to be passed upon by the jury. Briggs v. Minneapolis Street Ry. Co., 52 Minn. 36, 53 N. W. 1019. An exception to this rule is found in such cases as those where a physician is permitted to give his opinion as to the cause of death, or analogous questions. If, as claimed by defendant, the evidence failed to indicate whether the unexpected stop was caused by the engineer or the defective valve, it would be clearly improper to permit a witness to give his opinion upon the subject. But, as already pointed out, the evidence tended to show that the sticky valve would only be responsible for the application of the emergency when a light reduction had been first made. The plaintiff's testimony was to the effect that no such first or light reduction had been made. The opinion of the witnesses was as to how the stoppage could have been caused if the plaintiff's testimony was true. This amounted to no more than the expression of their opinion upon a question of mechanics; i. e., what under given circumstances would produce a certain result. We are not prepared to say that the witnesses were

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not properly qualified experts, and therefore think there was no error in receiving their testimony. Beardsley v. Minneapolis Street Ry. Co., 54 Minn. 504, 56 N. W. 176; Scarlotta v. Ash, 95 Minn. 240, 103 N. W. 1025; Getchell v. Hill, 21 Minn. 464; Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665; Donnelly v. St. Paul City Ry. Co., 70 Minn. 278, 73 N. W. 157.

5. We find no error in the instructions to the jury. The evidence did not show the plaintiff to have been guilty of contributory negligence as a matter of law. He cannot be said to have assumed the risk of the engineer's negligence. The court instructed the jury: "Finally, if you find from the evidence that the plaintiff was, just before the accident, in the line of his duty on the ladder next the caboose attached to this train, and if you further find that the engineer in charge of the train unnecessarily applied to the train a stop called a dynamiter, unnecessarily and unusually sudden and severe, by which the plaintiff was violently thrown from his position to the ground and under the wheels of the car, and thereby caused the injury he complains of, and if you further find that the plaintiff was not himself negligent in the premises in the position which he assumed, or in anything he did or omitted to do with reference to his position there, then the plaintiff should recover; and your verdict should be for the plaintiff." We see no error in this. If the engineer unnecessarily brought the train to a sudden and severe stop, it was a negligent act upon his part, which entitled the plaintiff to recovery, if as a result he was injured.

Order affirmed.

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DELIA KEEVER v. CITY OF MANKATO.

KATE FLANAGAN v. SAME.[1]

December 23, 1910.

Nos. 16,282, 16,283—(5, 6[2]).

Pollution of water supply — liability of defendant city.

A complaint charged that defendant city negligently allowed the supply in its waterworks system to become polluted with poisonous substances, and large quantities of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it is *held:*

1. The municipality was liable for its negligence in its private or corporate capacity, and was not exempt because it was carrying out a governmental function.

2. Under section 4503, R. L. 1905, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon. Maylone v. City of St. Paul, 40 Minn. 406, and Orth v. Village of Belgrade, 87 Minn. 237, followed.

Action by the administratrix of the estate of Lewis Eugene Keever, deceased, in the district court of Blue Earth county, to recover $5,000 for the death of her intestate, caused by defendant's alleged negligence in permitting its water supply to become polluted. Another action was brought by the administratrix of the estate of F. R. Flanagan, deceased, to recover the same amount for the death of her intestate, caused by the same negligence. The substance of the complaints is stated in the opinion. Defendant demurred to the complaints, and from orders sustaining the demurrers, Pfau, J., plaintiffs appealed. Reversed.

[1]Reported in 129 N. W. 158, 775. [2]April, 1910, term calendar.

[Note] Distinction between public and private functions of municipal corporations in respect to liability for negligence, see note in 19 L.R.A. 452; and note in 1 L.R.A.(N.S.) 665.

Liability of municipality for death or sickness caused by sewage or drainage, see note in 22 L.R.A.(N.S.) 940.

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Chris Carlson and *Dunn & Carlson*, for appellants.

There is a distinction between the exercise by a municipal corporation of a public or governmental function and a private or corporate function. In the former no liability attaches for negligence, in the latter it does. Board v. Common Council, 28 Mich. 229; Bailey v. Mayor, 3 Hill, 531.

The text writers are all agreed that the classification of private and public functions is the law of the land and in general the furnishing of water for domestic use is a private function, with the attendant liabilities, the same as attaches to an individual engaged in the same business. 1 Dillon, Municipal Corp. (3d Ed.) §§ 66, 67; 5 Thompson, Negligence, § 5829. (Liable for negligence in maintaining water works.) 1 Smith, Municipal Corporations, § 802. (Liable for negligence in furnishing wells and water.) 3 Abbott, Municipal Corporations, § 892 (Same doctrine as to water works). Tiedeman, Municipal Corporations, § 327b (Same doctrine as to water works). 1 Jaggard, Torts, p. 179; 28 Cyc. § 1289 (Public wells; liable for negligence in maintaining). Bailey v. Mayor, supra. Wiltse v. City of Red Wing, 99 Minn. 255; Western v. City, 31 Pa. St. 185; Aldrich v. Tripp, 11 R. I. 141; Esberg v. City, 34 Ore. 282; Wagner v. City, 146 Ill. 139; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 282; Judson v. Borough, 80 Conn. 384; Brown v. Salt Lake City, 33 Utah, 222; City v. Selz, 202 Ill. 545; Ottersbach v. Philadelphia, 161 Pa. St. 111; Todd v. City, 79 Neb. 671; Davoust v. Alameda, 149 Cal. 69.

The distinction is no more clearly drawn than in the state of Massachusetts. In that state the liability for negligence in maintenance of streets and highways is entirely statutory, and therefore governed entirely by the language of the several statutes. Hill v. City, 122 Mass. 344; Oliver v. City, 102 Mass. 489, 497; Merrimack v. City, 152 Mass. 556; Lynch v. Springfield, 174 Mass. 430; Little v. City, 177 Mass. 114; Collins v. Greenfield, 172 Mass. 78, 80. The law of Minnesota is in harmony with this principle. Snider v. City of St. Paul, 51 Minn. 466, 470; Reed v. City of Anoka, 85 Minn. 294; Powell v. City of Duluth, 91 Minn. 53; Wiltse v. City

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of Red Wing, supra; Gordon & Ferguson v. Doran, 100 Minn. 343; City of Winona v. Botzet, 169 Fed. 321.

The city of Mankato was exercising a private function in the operation of its waterworks plant and was liable for negligence. City Charter, c. 9, § 1; c. 6, §§ 15, 16.

An action for death by wrongful act is maintainable against a municipality. R. L. 1905, § 4503; Maylone v. City of St. Paul, 40 Minn. 406; Orth v. Village of Belgrade, 87 Minn. 237.

John W. Schmitt, City Attorney, *Harrison L. Schmitt, Samuel B. Wilson* and *Lorin Cray,* for respondent.

It is well settled in the United States, and in this state, that cities as well as counties, townships, etc., are not liable in damages for injuries resulting from the negligence of their officers or agents while engaged in the performance or carrying out of so-called governmental functions, in the absence of statutory provisions making them liable.

To this general rule there is in this state, and some of the other western states, the well-known exception, that cities are held liable for damages arising from their negligence in failing to keep in repair and in a safe condition their public streets, without any statutory provision making them liable therefor. Schigley v. City of Waseca, 106 Minn. 74; Davoust v. Alameda, 149 Cal. 69; City v. Long, 17 Grat. 375; Claussen v. City of Luverne, 103 Minn. 491; Gullikson v. McDonald, 62 Minn. 278; Lane v. Minnesota State Agricultural Society, 62 Minn. 175; Snider v. City of St. Paul, 51 Minn. 466; Hill v. City, 122 Mass. 344.

The city of Mankato in its ownership and operation of its waterworks system is exercising and performing governmental functions. Smith, Modern Law of Municipal Corporations, §§ 269, 270, 271, 273, 779, 780; 1 Abbott, Municipal Corporations, § 146; 3 Abbott, Municipal Corporations, § 2226; Elliott, Municipal Corporations, §§ 146, 306, 321; City v. Braden, 130 Ind. 149; Smith v. Nashville, 88 Tenn. 464; Jacksonville v. Jacksonville (Fla.) 30 L.R.A. 540; Miller v. City of Minneapolis, 75 Minn. 131; Claussen v. City of Luverne, supra; City of East Grand Forks v. Luck, 97 Minn. 373;

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Springfield v. Village, 148 N. Y. 46; Grube v. City of St. Paul, 34 Minn. 402.

In its ownership and operation of its waterworks system, the city of Mankato is exercising its police power, for and in behalf of the health, safety and general welfare of its inhabitants and the public generally. 2 Abbott, Municipal Corporations, 1142, 1143, also note to section 888; City v. Selz, 202 Ill. 545; Tollefson v. City, 228 Ill. 134; Sp. Laws 1891, c. 47, subc. 9, § 10; Sp. Laws 1891, c. 47, subc. 4, § 29; Evans v. City, 231 Ill. 223; Prime v. City, 192 N. Y. 105; Bryant v. City of St. Paul, 33 Minn. 289; Claussen v. City of Luverne, supra; 1 Farnham, Water & Water Rights, § 146; City v. Braden, supra; Smith v. Nashville, supra; Jacksonville v. Jacksonville, supra; Elliott, Municipal Corporations, §§ 146, 306, 321; Miller v. City of Minneapolis, 75 Minn. 131; Springfield v. Village, 148 N. Y. 46; Green v. Ashland, 101 Wis. 258.

It would not be sound policy to open the door, and permit actions for injuries like these to be maintained, for the reason that the result would be that the city of Mankato, as well as any other city, or cities, liable at any time to have the same misfortune, would be bankrupted thereby. This would result in the destruction of a branch of the government. 23 Am. & Eng. Enc. (2d Ed.) 455; Mechem, Public Officers, 348; Orme v. Kingsley, 73 Minn. 143; McNamara v. Gargett, 68 Mich. 454; Eastman v. Meredith, 36 N. H. 284; Conway v. City, 61 Tex. 10; Stewart v. City, 9 La. An. 461; Dargan v. Mayor, 31 Ala. 469; City v. Long, 17 Grat. 375.

See also cases in this state holding no liability for damages resulting to premises in a city by reason of change of streets prior to amendment of constitution. Russell v. Men of Devon, 2 T. R. 667; Frazer v. City, 186 Ill. 480; City v. Allen (Tex. Civ. App.) 40 S. W. 324; Goodyear v. Brown, 155 Pa. St. 514; 2 Abbott, Municipal Corporations, 1231; Springfield v. Village, 148 N. Y. 46; Hughes v. City, 161 N. Y. 96; Williams v. Town, 130 N. C. 93; Kavanagh v. Barber, 131 N. Y. 211; Thompson, Corporations, § 6276; City v. East, 117 Ind. 126; Wharton, Negligence, § 257; 1 Abbott, Municipal Corporations, 223; 3 Abbott, Municipal Corporations, § 967, p. 2245; Buckingham v. Plymouth, 142 Pa. St. 221.

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If it is the law in this state that a municipal corporation can be held liable for injuries resulting from the negligence of its officers, in connection with its ownership and operation of a municipal waterworks, still this complaint does not state a cause of action. Such cause of action died with the plaintiff's decedent. Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 125; R. L. 1905, § 4503; G. S. 1878, c. 77, § 1; Laws 1889, c. 109; Const. Minn. art. 4, §§ 33, 36; Const. Minn. art. 1, § 1; G. S. 1866, c. 34; R. L. 1905, § 2839; Sutherland, Statutory Construction, § 229; R. L. 1905, § 5513; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5.

The statute is in derogation of the common law and must be strictly construed. Sutherland, Statutory Construction, §§ 290, 390, 400.

Actions founded on such statutes must strictly conform to them. Such statutes cannot be extended by implication. The relief or remedy provided is not extended to any other person than those mentioned in the statutes. 2 Sutherland, Statutory Construction, §§ 371, 378, 398. "Public rights will not be treated as relinquished or conveyed away by inference or legal construction. Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed. A statute conferring privileges upon individuals should not be so construed as to work a public mischief." 2 Sutherland, Statutory Construction, § 558; Wallace v. Lawyer, 54 Ind. 501; Linehan v. City, 109 Mass. 212; Switzer v. City, 40 Kan. 250; State v. District, 16 R. I. 424; George W. Emory & Co. v. Commissioners (Del.) 55 Atl. 118; Sherman County v. Simonds, 109 U. S. 735; McDougal v. Board of Supervisors of Hennepin County, 4 Minn. 130 (184).

JAGGARD, J.

This is an action for death by wrongful act, occasioned by the negligence of the defendant city. The complaint alleged that defendant, a municipal corporation, negligently allowed waters and the water supply in its waterworks system to become infected and polluted with poisonous substances "and large quantities of filth and sewage, all of which were saturated with the germs of diseases, * * * and did carelessly, negligently and recklessly * * *

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permit * * * foul, filthy and dangerous substances, common sewage, and other filth to escape into and saturate the water supply;" that by reason thereof the water became imminently dangerous to life and health, of which defendant had full notice and knowledge; that plaintiff's intestate, a citizen and resident, used the water, contracted typhoid fever, and died in consequence. The complaint set forth additional facts as [to] the right of the administrator to recover. Defendant's demurrer to plaintiff's complaint was sustained. From that order the plaintiff appeals. It is to be noted that the complaint in the case at bar set forth not a mere action against the defendant to recover damages because the city failed to provide an adequate supply of pure water. The question here is whether the city is liable for, among other things, recklessly causing dangerous substances, like common sewage and other filth, to saturate its water supply and the wells, mains, and appurtenances thereto.

1. The first essential question is whether the city is exempt because it was carrying out a governmental function, or whether it is liable because it operated the waterworks in its private or corporate function. The defendant naturally insists that it was performing merely a governmental function. There is ambiguity in that term as used in this connection. It may mean that the operation of waterworks by a municipality is infra vires as distinguished from ultra vires, or it may mean that such function is public as distinguished from private or proprietary, in which capacity the city may voluntarily assume for business purposes and for its own advantage to conduct certain operations, and is held responsible for negligence therein, although the work is done ultimately for the benefit of its citizens. Many of the authorities to which defendant refers us properly hold that a city may properly operate waterworks. They have no tendency whatever to determine whether or not the city is or is not exempt in its operation of waterworks.

Defendant also insists that the city can make no profit out of its operation of these waterworks. Doubtless this is in a general way true. At all events it may be here admitted. But the sequence which defendant seeks to draw does not at all follow; i. e., that therefore it should be exempted from all liability for mismanagement. For

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the city is liable for neglect in connection with its streets, sidewalks, and sewers, from which, in their very nature, no profit is or can be made. The city operates the waterworks for profit, in the sense that it is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit-making business. The city "is exercising a special privilege for its own benefit and advantage, notwithstanding a portion of the water is used by the city for protection against fire and in promoting the public health." Hamersley, J., in Hourigan v. City of Norwich, 77 Conn. 358, 59 Atl. 487. The English authorities regard cities in such matters as "substitutions on a large scale for individual enterprises." Mr. Justice Blackburn, in Mersey Dock Trustees v. Gibbs, L. R. 1 H. L., at page 107, approving Mr. Justice Mellor in Coy v. Wise, 5 B. & S. 440.

Finally defendant insists that it would not be sound policy to open the door and permit actions like the present to be maintained, for the reason that as a result the defendant city, as well as any other city, would be liable at any time to have the same misfortune, and would be bankrupted thereby. The assessed valuation of the city is less than $4,000,000. If the city is not exempted from liability, it is subject to claims of the same nature as the present amounting to over $10,000,000. Thus the very existence of the city is threatened, and the city subjected to total destruction, which could be of no proportionate advantage to the individuals who suffered.

It readily suggests itself as an answer to this dark prognostication that the number and nature of these cases does not appear in the record, and is not known to the court; besides, for the purposes of this case, the neglect of defendant is necessarily assumed. To the defendant, under the law, a number of defenses are available. How conclusive they may be in fact is wholly beyond any conjecture which we can recognize. Accordingly we must regard defendant's figures as purely hypothetical. The question is one of general principles recognized by the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may

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dictate under particular circumstances. The general experience of public and private waterworks is that ordinarily their operation involves no such financial disaster as defendant portrays.

It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why its citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged. As Elliott, J., said in City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 6 L.R.A.(N.S.) 198:

"When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is, not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not in either case exercising a municipal function. * * * When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as private corporations or individuals."

And see Powell v. City of Duluth, 91 Minn. 53, 97 N. W. 450; Gordon & Ferguson v. Doran, 100 Minn. 343, 111 N. W. 272, 8 L.R.A.(N.S.) 1049; State v. Board of Water & Light Commrs., 105 Minn. 472, 117 N. W. 827, 127 Am. St. 581. Thus in Wiltse v. City of Red Wing, 99 Minn. 255, 109 N. W. 114, a city operating the waterworks was held liable for water escaping from an embankment under the rule in Rylands v. Fletcher; "for," said Start, C. J., "although a municipal corporation, it was engaged in the business of supplying water to its inhabitants for profit, an undertaking of a private nature."

This is undoubtedly the general rule. See Piper v. City, 140 Wis. 311, 122 N. W. 730, 25 L.R.A.(N.S.) 239, 133 Am. St. 1078; Board v. Common Council, 28 Mich. 229, 15 Am. Rep. 202; Bailey

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v. Mayor, 3 Hill (N. Y.) 531, 38 Am. Dec. 669. As to the reasoning of this case, however, see Darlington v. Mayor, 31 N. Y. 164, 198, 88 Am. Dec. 248. Cf. Missano v. Mayor, 160 N. Y. 123, 54 N. E. 744; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 34 L.R.A. 518; City of Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L.R.A.(N.S.) 204; Judson v. Borough, 80 Conn. 384, 68 Atl. 999, 15 L.R.A.(N.S.) 91; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L.R.A. 522; Esberg v. City, 34 Ore. 282, 55 Pac. 961, 43 L.R.A. 435, 75 Am. St. 651; Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L.R.A.(N.S.) 619, 126 Am. St. 828; Hourigan v. City of Norwich, supra; Lynch v. City of Springfield, 174 Mass. 430, 54 N. E. 871; City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386; City of Philadelphia v. Gilmartin, 71 Pa. St. 140, 141; Springfield v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L.R.A. 660, 51 Am. St. 667; Asher v. Hutchinson, 66 Kan. 496, 71 Pac. 813, 61 L.R.A. 58.

The cases in which a city has been held responsible or irresponsible for damages by fire consequent upon an [in]adequate supply of water are in a class of cases by themselves. The rule holding the city liable for its negligence in this case may not be consistent with the rule there announced. The law does not undertake to achieve the impossible. As was said in Gould v. Winona Gas Co., 100 Minn. 258, at page 264, 111 N. W. 254, at page 256, 10 L.R.A.(N.S.) 889: "It is evident that the ultimate justification of the inapplicability of the rule (there in question) * * * lies in the controlling regard of the common law, not for doctrine, but for common sense. Its paramount object is to work out substantial, not metaphysical, justice. Its just claim to distinction is to be found, not in the logical consistency of its applied theories, but in the practical wisdom with which it has adapted its rules to varying subject-matter and conditions."

Defendant also urges that in no case has the city been held liable for negligence in the operation of its waterworks, unless the act involved a trespass, or an invasion of a direct property right. Thus

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water escaping from a city reservoir runs onto another's property and does damage; this is trespass, and there is liability. Wiltse v. City of Red Wing, supra. But if the escaping water should do damage to a person and a public highway, there would be no trespass, but the law would recognize liability. Liability of the city is recognized in the case of streets and sidewalks, which cannot properly involve trespass. Nor has defendant shown any reason for imposing liability, in the case of trespass or the breach of insurance of safety which does not logically apply to cases of negligence. On general principles, liability for negligence is more just and more generally recognized, because it is based upon culpability.

2. The question then arises whether, upon the assumption that plaintiff's intestate could have maintained an action against the defendant city, had he lived, his executor can maintain an action under our statutes. Section 4503, R. L. 1905, provides: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor, if he might have maintained an action, had he lived, for an injury caused by the same act or omission." Defendant has pressed upon us very earnestly that "corporation," as here used, refers only to private corporations (see section 2839, R. L. 1905), and does not include municipal corporations. The matter is not de novo in this state. In Maylone v. City of St. Paul, 40 Minn. 406, 42 N. W. 88, and in Orth v. Village of Belgrade, 87 Minn. 237, 91 N. W. 843, the administrators of deceased persons were allowed to pursue the statutory action against the city for negligence causing death. Such has been the settled construction in practice for many years. We do not feel at liberty to change that construction.

Reversed.

On February 3, 1911, the following opinion was filed:

JAGGARD, J.

In its motion for reargument, defendant contends, in the first place, that the question of the construction of section 4503, R. L. 1905, securing the cause of action in case of death by wrongful act, that is, the question whether the defendant, a municipal corporation,

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was a corporation within the meaning of that statute, is de novo in this state, notwithstanding the fact that in Maylone v. City of St. Paul, 40 Minn. 406, 42 N. W. 88, and in Orth v. Village of Belgrade, 87 Minn. 237, 91 N. W. 843, this court determined that recovery on such a cause of action could be had in this state against a municipality under that statute and sustained such recovery. It is only by ignoring these two decisions that defendant's argument is tenable. There is neither reason nor authority for so doing. It is entirely obvious that the self-contradictory proposition which defendant emphasizes, gains no force by its own iteration. No reason accordingly is thereby suggested for changing the original opinion on this point.

Defendant urges, in the second place, that the court erred in assuming that the question of the nonliability of the city on the ground of public policy was not before the court. In point of fact, the court neither so assumed nor so determined. What is said on this point was this: "The question is one of general principles recognized by the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may dictate under particular circumstances." The court did determine that the conjectural hardship of the operation of the rule of liability of a municipal corporation in this particular case, was not an exclusive nor controlling consideration. The decision rested in effect upon this supreme consideration, namely, that public policy requires the conservation of human life, the preservation of public health, and the establishment of public sanitation on a firm and certain basis in the law. No reason whatever for changing our opinion as to the soundness of this view of public policy has been suggested.

Defendant urges, in the third place, the court overlooked what it has repeatedly held, that the cases holding cities in this state responsible for injuries caused by defective streets, in the absence of a statute making cities responsible for such injuries, are "illogical exceptions" to the general rule, and should therefore not be considered as authority in favor of liability in the cases at bar. In point of fact this is not in accordance with the actual record. The court did not overlook this familiar and elementary point. On the contrary,

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it expressly adverted to the lack of philosophical and metaphysical consistency in the authorities on the question of the immunity or liability of municipal corporations in tort. The court in its opinion did not, however, undertake the equally venturesome and improper feat of ignoring the thousands of decisions on the point whose authority is unquestioned and unquestionable. Defendant contends in this connection without apparent consciousness of the humor of the situation, that the original conclusion of the liability of the city for its tort was erroneous, because it was held in Nerlien v. Village of Brooten, 94 Minn. 361, 102 N. W. 867, that a city could be restrained from using a public building as a place for selling flour. It is perfectly obvious that that decision furnishes no reason, apparent or otherwise, direct or indirect, for holding the city either immune or responsible in this case.

Finally defendant demonstrates the unsoundness of its position by this argument, namely, that this conclusion in chief "invades the province of the legislature; the legislature alone can give cities the right to furnish itself and its citizens water from a municipal waterworks, and it is for the legislature, and not the courts, to say under what conditions as to liability such cities may do so. The general rule is that cities are immune from liability for injuries resulting from torts." When this controversy was presented to this court, it was the duty of the court to determine it by reference to both precedents and principle. The result was not judicial legislation, but a judicial declaration of what the law was. That declaration made no change in the law; au contraire, it would have been judicial legislation, if the court had changed the law and decided this case in accordance with defendant's contention. The many authorities referred to in the opinion in chief and many others, declare the law to be as this court found it to be. See for example: 1 Dillon, Mun. Corp. (3d Ed.) §§ 66, 67; 5 Thompson, Neg., § 5829; 1 Smith Mun. Corp. § 802; 3 Abbott, Mun. Corp. § 892; Tiedeman, Mun. Corp. § 327b; 1 Jaggard, Torts, p. 179; 28 Cyc. 1289. Compare Ottersbach v. Philadelphia, 161 Pa. St. 111, 28 Atl. 991; Todd v. Crete, 79 Neb. 671, 113 N. W. 172; Davoust v. Alameda, 149 Cal. 69, 5 L.R.A.(N.S.) 536.

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The fallacy of inferring that this defendant was not liable from a general rule of immunity is obvious. That general rule is merely this, that sometimes cities are immune and sometimes they are not. Defendant does not insist that the rule of immunity is universal or invariable, on the contrary, defendant distinctly recognizes exceptions to that rule. Whether this case fell within the rule or the exception was the very point we were called upon to decide. Defendant's argument would have had much more weight, if it had referred the court to a single case in which under like circumstances the rule of immunity had been applied. This defendant has failed to do, and we believe for the perfectly good and natural reason that there is no such authority. Certainly Hughes v. Auburn, 161 N. Y. 96, 46 L.R.A. 636, 637, to which defendant now calls our attention, is not an authority; to the contrary. This case did not involve liability in the conduct of waterworks at all. The cases concerning the inadequacy of water supply for fire departments, it is perfectly obvious, involve essentially different circumstances from those presented by the case at bar.

The motion for reargument must therefore be denied.

JACOB L. BROWN v. DOUGLAS LUMBER COMPANY and Others.[1]

December 23, 1910.

Nos. 16,726—(63).[2]

Question for the jury.

Whether defendants Bell & Co. were, as independent contractors, solely responsible to plaintiff for injury sustained while in their employ, was in this case a question for the jury.

[1]Reported in 129 N. W. 161. [2]October, 1910, term calendar.

[Note] Liability of master to employees of contractor for unsafe appliances or place of labor, see note in 26 L.R.A. 524.

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Degree of care required in guarding dangerous machinery.

The degree of diligence required of the owner of dangerous machinery, in guarding it as provided by statute, is greater than is ordinarily required of a master to see that machinery and appliances furnished by him are free from defects.

Error to admit evidence.

Where the issue is whether one has absolved himself from liability by turning over control of a mill or factory to an independent contractor, it is error to permit evidence that prior to the making of the contract the owner had taken out employer's liability insurance.

Submission of specific questions to jury.

When the trial court in its discretion directs the jury, in addition to the general verdict, to answer specific questions, the jurors are not at liberty to disregard such direction.

Experiments in presence of jury.

Permitting experiments in the presence of the jury rests in the sound discretion of the trial court.

Review of court rulings.

Several minor rulings considered.

Action in the district court for Beltrami county against defendant lumber company and the partners in the firm of Bell & Company to recover $10,000 for personal injuries. The facts are stated in the opinion. The negligence alleged in the complaint was a failure to guard properly the dangerous machinery and the absence of the guides therefrom. The case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for $3,500. From an order denying defendant Douglas Lumber Company's motion for judgment notwithstanding the verdict, or for a new trial, it appealed. Reversed as to appellant and new trial directed as to it.

Marshall W. Spooner and *P. J. McLaughlin,* for appellant.

E. E. McDonald, John L. Brown, and *Charles W. Scrutchins,* for respondent.

O'Brien, J.

Douglas Lumber Company owns a lath mill at Bemidji, in this state. On February 12, 1907, it entered into a contract with T. W.

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Bell, embodied in a written proposal from him to the company, the material portions of which were the following:

* * * "I will take your lath mill located on Lake Irving, Bemidji, Minn., in its present condition, and will manufacture lath for you in a good workmanlike manner and in accordance with your instructions for the sum of seventy (70) cents per thousand, tied in bundles of fifty in a bundle. * * * I agree to employ experienced men on the bolter and lath machines in the mill, a competent licensed engineer during the day, and a reliable man as night watchman. I am to pay the man on the pond, all of the men in the mill, both upstairs and downstairs, including the engineer and night watchman. You are to pay for putting the bolts in the pond, and for taking the lath, edgings, and sawdust away from the mill. * * * I agree to do my millwright work at noon and nights, when the mill is shut down, so that the mill may run steady for five hours at a time without stopping for anything. I agree to run the mill ten hours daily commencing Monday, February 18, 1907. If you desire to run the mill day and night during the summer months, I agree to do the work by contract, on the same basis per thousand as for making lath during the daytime. You are to pay me each Saturday for all lath manufactured up to the previous night. This contract is for one year from February 18, 1907, to February 18, 1908. Should your mill burn down, or should anything happen to put it out of commission for a period of sixty days or longer, then at your option this contract shall terminate and become null and void, by your giving me written notice to that effect. In case the mill is closed down, you are to pay me at the rate of $3.00 per day, and I am to do whatever work you may designate." * * *

One of the machines in the mill was a bolter used for making a preliminary reduction in the material to be sawed into laths. There were seven circular saws upon this machine, about one and one-half inches apart. It was supplied with rollers, and one man fed the timber into the machine through the rollers against the saws, and another received the separated pieces at the rear. Beneath the bolter was a chute, into which fell the sawdust and pieces of boards and edgings. If, as occasionally happened, this material accummulated and clogged

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up the chute, the action of the saws would hurl with great force such pieces of wood as came in contact with them. To protect those using the machine, planks had been fastened in the front and rear ends of the bolter, extending from the floor to the table or surface. As originally constructed, guides were placed between the saws, the object of which apparently was to hold the lumber in place, and, as claimed, to keep the saws from "wobbling." They had been removed; the result being to leave a somewhat larger opening in the table, and permitting perhaps a greater quantity of material to fall through and into the chute beneath.

Plaintiff, under employment of defendants Bell & Co., was engaged as the receiver or rear man upon this machine, and was injured by being struck by a piece of board hurled by the saws as described. There was an aperture in the planking guarding the rear end of the machine, caused by the removal of a board. The evidence did not show how long this defective condition of the guard had existed prior to the accident; but it had continued for some days. The negligence alleged in the complaint was a failure to properly guard and the absence of the guides. Plaintiff had a verdict against both defendants. Douglas Lumber Company appeals from an order denying its alternative motion.

1. Appellant contends it is entitled to judgment, upon the ground that plaintiff was in the employ of W. T. Bell & Co., independent contractors, that appellant owed no duty to plaintiff, and is in no way responsible for any injury he sustained. It is apparent this court should not direct judgment, unless the relation of the parties claimed by appellant is conclusively established by the terms of the written contract. Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958. We do not think the contract goes to the extent claimed.

Appellant's business was the manufacture of lath. In the course of carrying on this activity it made the contract with Bell, which provided the means for performance of a part of its business. Bell undertook this by the use of certain instrumentalities, which appellant was to and did furnish. The manner of using the mill was to some extent at least under appellant's control. There was evidence

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that at least some supervision was exercised by appellant's officers, and, taken in connection with the contract itself, we think the responsibility of appellant was for the jury. Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45; Rait v. New England F. & C. Co., 66 Minn. 76, 68 N. W. 729. These cases are easily distinguished from Aldritt v. Gillette-Herzog Mnfg. Co., 85 Minn. 206, 88 N. W. 741. In that case full control of the manner and means of performance was in the one held to be an independent contractor.

2. As said, plaintiff alleged, and offered evidence to establish, two negligent acts: (1) Failure to guard dangerous machinery; (2) a defective machine, because of the absence of guides. The first, if true, was a neglect of the statutory duty to guard, and defendant's duty in that respect was absolute, as declared in a long line of decisions of this court. Glockner v. Hardwood Mnfg. Co., 109 Minn. 30, 122 N. W. 465, 123 N. W. 807. Given a dangerous machine, which it is practical to guard, the inquiry as to the master's negligence ends when a failure to guard is shown. But this is not true as to a mere defect in an instrumentality, which is the most that can be claimed because of the absence of the guides. Their absence may have rendered the machine more dangerous, by permitting more and larger pieces to fall beneath the table; but this was a question of degree in the dangerous character of the machine. The liability of defendants for an injury occasioned by such condition is to be determined by the ordinary rules governing the use of defective appliances. In such case the sound judgment and degree of care exercised by the person furnishing the machine become important factors and must be considered by the jury. Monsen v. Crane, 99 Minn. 186, 108 N. W. 933.

When instructing the jury the learned trial judge said: "I wish to say to you that the fact, if such appears to you from the evidence, that it was the custom of the defendants and other millmen to guard machines of this type in a certain manner is immaterial in this case, and could be no excuse for failure on the part of the defendants to properly and sufficiently guard this machine, and it is immaterial whether this machine was or was not manufactured with a guard. And if the bolting machine was, in the condition in which it

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existed at the time of this injury, in fact dangerous because of the absence of an adequate and sufficient guard at the rear of said machine, or because no guides were provided thereon, which guards and guides it was practicable to provide, the plaintiff can recover in this action, although the defendants could not have reasonably anticipated injury to a person in the precise way in which this injury actually occurred."

This instruction, while correctly stating the law as to guards required by the statute, imposed upon defendants an unwarranted strict rule with reference to the guides between the saws. An examination of the entire charge is convincing that the distinction between defendants' duty to guard the machine and their negligence in operating it without the guides was ignored throughout. Because of this there must be a new trial of the action.

3. It is also proper, in view of another trial, to indicate our views upon other features of the case. On January 28, 1907, fifteen days prior to the date of the contract between the defendants, Douglas Lumber Company procured an employer's liability policy of insurance. When the accident to plaintiff occurred, appellant reported the fact, and certain correspondence resulted, the most important being a letter from appellant, in which was the following: " * * * For your information, we wish to advise you that the payroll of T. W. Bell, contractor, is included in our policies with you, and we are therefore looking to you for the protection guaranteed under the policies. By referring to your letter to us dated December 17, 1906, you will notice that our lath mill payroll is estimated at $7,000, which is just about the amount we are paying Mr. Bell, contractor, for doing the work for us. It was the understanding, at the time your Mr. Hazard was here, that our policies covered all employees in our mill, no matter whether they worked for us direct or worked for a contractor, inasmuch as the estimated payroll of $7,000 included both our own men and the men employed by the contractor. Please advise us by return mail what action you wish us to take in case any claim is made on us for damages in the J. L. Brown case; also whether we are fully protected, as we believe we are, under our present policies with you."

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Over objection, the policy and correspondence were placed in evidence by plaintiff as a declaration against interest, and tending to show that appellant considered itself liable for plaintiff's injuries. A very similar question was considered in Barg v. Bousfield, supra, and decided in favor of plaintiff's contention. In this case it appears the policy was issued before the contract with Bell was made, and it is difficult to see more in the correspondence than a desire upon appellant's part to insist that the insurance company was liable to it, if in fact appellant was liable to plaintiff. It would seem the same claim could be made against any defendant, reporting an accident to an insurance company upon a claim that, if liability existed, it was covered by the policy. Unless we are prepared to go to that length, and say that in every case where a defendant is insured by a policy of this character the fact may be shown, we fail to see the competency of this testimony. We think the doctrine of the Barg case in this respect should not be extended, and that this evidence should have been excluded.

4. The jury were instructed to answer three specific questions submitted to them. Instead of doing so, the sheet containing the questions was indorsed, "We, the jurors, think our verdict an answer to all these questions." This the foreman signed. The submission of these questions rested in the sound discretion of the court. The indorsement amounted to a statement that in the opinion of the jurors it was unnecessary for them to make any answer. Without discussing the materiality of each question, we do not think the discretion of the jurors should be thus substituted for that of the court. The jurors should have been required either to answer the questions or give some good reason for their inability to do so. Morrow v. St. Paul City Ry. Co., 74 Minn. 480, 77 N. W. 303; Elliott v. Village of Graceville, 76 Minn. 430, 79 N. W. 503; Eischen v. Chicago, M. & St. P. Ry. Co., 81 Minn. 59, 83 N. W. 490.

5. Plaintiff exhibited his physical injuries to the jury, and his counsel and a physician made some experiments upon plaintiff's body to demonstrate the extent of his injuries. This was permissible in the discretion of the court. Adams v. City of Thief River Falls, 84

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Minn. 30, 86 N. W. 767; State v. Gardner, 96 Minn. 318, 104 N. W. 971, 2 L.R.A.(N.S.) 49.

6. Some other errors assigned are disposed of by what has already been said. Briefly referring to others, we think the photographs were properly received, that the operation of the machine could be properly described by mechanical experts. Some work was done on the machine after Bell commenced performance of his contract. Appellant should have been permitted to show whether or not it was consulted or took part in the work. Part of a conversation was called out on cross-examination of a witness. On redirect plaintiff was entitled to the whole conversation.

Other assignments relate to the charge; but, with the exception noted, we think the case was properly submitted.

The order appealed from is reversed as to appellant, and a new trial directed as to it.

BROWN, J., took no part.

AGNES C. HEADLINE v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 23, 1910.

Nos. 16,768—(112).

Master and servant — presumption as to law of foreign state.

Plaintiff's intestate was a bridge carpenter employed by the defendant. The contract obligated the defendant to furnish him transportation to any place where it required him to work. While being so transported on a railway train of the defendant in Montana, there was a collision between his

[1]Reported in 128 N. W. 1115.

[Note] Conflict of laws as to action for death or bodily injury, see note in 56 L.R.A. 193.

Railroad employee being transported to or from work as passenger, see note in 31 L.R.A. 321; and note in 19 L.R.A.(N.S.) 717.

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train and one of its freight trains, whereby he was killed. The collision was caused by the negligence of the engineer and conductor of the freight train. This action was brought in the district court of Minnesota to recover damages for his death. Verdict for the plaintiff, but judgment was ordered for defendant notwithstanding the verdict. *Held:*

1. It does not appear what the common law of Montana applicable to these facts is; hence it is presumed to be the same as that of this state, and by it the question of the defendant's liability must be determined.

2. A contract obligation rested upon the defendant to safely transport the deceased to the place where it required him to work. Whether he was strictly a passenger while being so transported is immaterial, for by virtue of its contract it was the absolute duty of the defendant to exercise due care to secure his safe transportation. The negligence of the engineer and the conductor was its negligence.

Action in the district court for Hennepin county by the administratrix of the estate of Newton L. Headline, deceased, to recover $25,000 for the death of her intestate.

The complaint set out the provisions of section 6486 of the General Statutes of Montana, giving a right of action for wrongful death to the heirs or personal representatives of a decedent, and specified the heirs of the intestate. The amended answer alleged that the death of decedent was due to the negligence of employees of defendant who were fellow servants of the intestate, and that the collision referred to in the opinion was not due to the negligence of defendant; that by the law of Montana decedent was a fellow servant of the employees whose negligence caused his death, and there could be no recovery by the heirs or personal representatives of such fellow servant against defendant; and that the cause of action did not survive to decedent's heirs or personal representatives. The reply was a general denial. The facts are stated in the opinion.

The case was tried before Simpson, J., and a jury which returned a verdict in favor of plaintiff for $8,500. From an order granting defendant's motion for judgment in its favor notwithstanding the verdict, plaintiff appealed. Reversed and remanded, with direction to the district court to cause judgment to be entered for plaintiff upon the verdict.

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William B. Anderson and *Harlan P. Roberts,* for appellant.
Brown, Albert & Guesmer, for respondent.

START, C. J.

The plaintiff's intestate on December 28, 1908, was killed in the state of Montana by the alleged negligence of the defendant. This action was brought in the district court of the county of Hennepin to recover damages for his death. Verdict for the plaintiff in the sum of $8,500. The trial court, upon the defendant's blended motion for judgment or for a new trial, ordered judgment for it notwithstanding the verdict, upon the ground that by the laws of Montana the deceased was a fellow servant with the defendant's engineer and conductor, whose negligence caused his death, and hence no recovery could be had in Montana. The plaintiff appealed from the whole order.

The question here to be decided is whether the record shows, as a matter of law, that the deceased was killed solely by the negligence of his fellow servants. The here material facts are these:

Plaintiff's intestate was in the employ of the defendant as a carpenter; his work consisting of repairing bridges and other property belonging to the railroad company and situated on its line of road. He had charge of a crew of bridge carpenters, with headquarters at Great Falls, Montana. His duties required him to go from place to place whenever and wherever on its line the master carpenter should direct. As a part of the contract of employment, defendant agreed to transport him to and from the places where he was required to perform his work. At the time of his death he was proceeding from Hardy, a station on the road where he had been at work, to Dearborn Bridge, where he had been ordered to make certain repairs upon a bridge at that place. He was riding in a caboose attached to an extra work train, No. 322. Train No. 674, coming from the opposite direction, collided with the train upon which he was so riding, and he was thereby instantly killed. The collision was caused by the negligence of the engineer and conductor of train No. 674 in failing to obey the order of defendant, given through its train dispatcher, by which train No. 674 was directed to run one hour and

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thirty minutes late, and to pass train No. 322 at the station of Mid Canyon. Had the order been obeyed by the employees in charge of train No. 674, no collision would have occurred. There was no fault or neglect on the part of those in charge of train No. 322, in which the deceased was riding, and neither train crew had any authority or control over the crew of the other train. The conductor and engineer of train No. 674 had never theretofore disobeyed an order of this character, and defendant had no reason to suppose that this one would not be obeyed. Deceased was employed in the state of Montana, and his death as stated occurred in that state.

The statutes of Montana and the decisions of its supreme court, so far as here relevant, by stipulation are to be referred to and used as if actually in evidence.

It is the contention of the defendant upon these facts that the relation betwen the deceased and the engineer and conductor was by the law of Montana that of fellow servants, for whose negligence it is not liable. If this be well founded, then, whatever may be the rule in this state as applied to the facts like those at bar, the order appealed from must be affirmed. If, however, no rule has been laid down by the courts of Montana applicable to the special facts of this case, we must then inquire what the common law of this state is; for in the absence of pleading or proof to the contrary it will be presumed that the common law of Montana is the same as in this state. Crandall v. Great Northern Ry. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. 458; Engstrand v. Kleffman, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. 359.

The fellow-servant doctrine has not been abolished by statute in Montana, and the first inquiry is: Has the supreme court of that state declared what is the common law of the state applicable to the facts of this case? Four decisions of the supreme court of Montana are cited, from which it is contended that the law of that state sustains the conclusion of the court below that the relation of fellow servants existed between the deceased and the engineer and conductor. We are unable to concur in this view of the Montana decisions. In none of the cases referred to were the facts at all like the facts in this case.

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The question was not involved in Dillon v. Great Northern, 38 Mont. 485, 100 Pac. 960. That action was founded upon the statutes of the state, and it was conceded that the injured employee was a fellow servant with the employee whose negligence caused the injury. Goodwell v. Montana, 18 Mont. 293, 45 Pac. 210, involved facts wholly unlike those at bar. There the foreman of a gang of men was guilty of negligence in not giving proper warning of certain dangers incident to the work in the performance of which the foreman was engaged with the other men, and it was held that he was a fellow servant. Hastings v. Montana, 18 Mont. 493, 46 Pac. 264, was on its face substantially like the Goodwell case. In Mulligan v. Montana, 19 Mont. 135, 139, 47 Pac. 795, the fireman and engineer of the same train were fellow servants, a rule followed by practically all the courts.

The contention of counsel that these decisions clearly disclose the rule of Montana as applicable to the case at bar is founded in the main upon a course of reasoning having its principal support in the fact that in the opinions authorities are cited from the federal courts which apparently support the claim that the relation of fellow servants existed in the case at bar. Cases are cited by the Montana court which sustain plaintiff's contention that decedent and the crew in charge of train No. 674 were not fellow servants.

A careful consideration of the decisions cited leads us to the conclusion that we would not be justified in holding that the courts of Montana definitely settled the question here presented. It is true that such decisions indicate a purpose to follow the decisions of the federal supreme court as to the application of the fellow-servant doctrine; but there is no decisive indication as to which line of decisions of that tribunal should be followed. Whether the case of Baltimore & O. R. Co. v. Baugh, 149 U. S. 369, 376, 13 Sup. Ct. 914, 37 L. ed. 772, and allied cases shall be followed, or the case of Sante Fe Pac. R. Co. v. Holmes, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. ed. 1094, and McCabe & Steen C. Co. v. Wilson, 209 U. S. 275, 28 Sup. Ct. 558, 52 L. ed. 788, as applied to facts of this case, cannot well be determined from the decisions so far rendered by the Montana court. In the Baugh case an engineer and his fireman were, and properly so,

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held fellow servants. In the Holmes case a train dispatcher and an engineer who was guided in the performance of his duties by orders issued by the dispatcher, both being engaged in the service of operating trains, were held not fellow servants, and that the engineer could recover for the negligence of the dispatcher. In the McCabe case the department doctrine was recognized, and, if applied to facts like these at bar, would charge defendant with liability. For a bridge carpenter and an engineer of a train are clearly in separate departments of railroad work, so that, if the Montana court should adopt that rule, the liability of the defendant would be clear.

But in the absence of some clear and positive decision of that court based upon facts analogous to those here presented the conclusion must be that the rule controlling the question is unsettled in that state. The presumption, then, is that the common law of Montana here applicable is the same as that of this state, and we have this question: Is the defendant, upon the facts, relieved from liability for the death of the deceased on the alleged ground that he was a fellow servant of the engineer and conductor? That is, did the defendant owe him any personal duty in the premises?

The fellow servant rule has been accepted and enforced by this court, and its qualification, adopted by many other courts, to the effect that employees in independent departments are not fellow servants, has been rejected. This is settled by a long line of decisions of this court, among others the following: Foster v. Minnesota Central Ry. Co., 14 Minn. 277 (360); Brown v. Minneapolis & St. L. Ry. Co., 31 Minn. 553, 18 N. W. 834.

The great diversity of judicial opinion as to the reason of the rule indicates that it does not rest on any substantial basis of reason or justice, otherwise there would be unanimity, and that the true reason for its adoption was an economic one, in order to foster industries by relieving the master from liability to any of his employees for personal injuries due to the negligence of any other of his employees in the same industry. The injustice of making this exception to the rule of respondeat superior is obvious, thus compelling those who receive the least from an industry to assume its hazards to life and limb from the negligence of those over whom they have

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no control and in whose selection they have no voice. The rule, however, is the law of this state, as evidenced by the decisions of this court, and by the rule of stare decisis we are bound to enforce it in good faith.

Nevertheless reason and justice forbid that the rule should be extended or confounded with the rule as to the absolute duties of the master, as illustrated by the pioneer case of Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255, and later cases. So in this case the question of the defendant's liability depends largely upon whether it owed the deceased any personal or absolute duty as master by virtue of the contract of employment between them. The question must be considered from this viewpoint. Bjorklund v. Gray, 106 Minn. 42, 118 N. W. 59. The here material part of such contract was to the effect that the defendant should furnish him transportation from his headquarters or from any place where he happened to be at work as bridge carpenter foreman to any place the defendant required him to work for it. When he was killed, he was being so transported by the defendant on one of its railway trains, pursuant to the terms of the contract, to a place where he had been ordered to take charge of the repair of a bridge.

The contention of counsel for the defendant is to the effect that it owed the deceased no personal duty, as he was not a passenger, and that the negligence which caused his death was strictly that of his fellow servants. This contention is urged in an able and exhaustive brief, citing and analyzing numerous authorities, all of which have received attentive consideration. We find ourselves unable to concur in the conclusion that the defendant owed the deceased no personal duty. The cases cited by counsel sustain the general proposition that an employee of a carrier traveling to or from his work in its cars free from charge, as stipulated for in the contract of service, is not a passenger, but merely an employee. Seaver v. Boston, 14 Gray (Mass.) 467; Vick v. New York, 95 N. Y. 267, 47 Am. Rep. 36; Elliot v. Chicago, 5 Dak. 523, 41 N. W. 758, 3 L.R.A. 363.

In the case of McNulty v. Pennsylvania, 182 Pa. St. 479, 38 Atl. 524, 38 L.R.A. 376, 61 Am. St. 721, it was held that an employee of a railway company, who was carried to and from his work

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on a train in consideration of a reduction in the price of his wages, was a passenger. In the case of Peterson v. Seattle, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L.R.A. 586, the defendant was employed by the street car company at $1.50 per day and free transportation to and from his work. He was injured by the negligence of the defendant's motorman while riding home from his work on defendant's street car. It was held that he was not a fellow servant of the motorman, but that the defendant was liable for the motorman's negligence. See also Doyle v. Fitchburg, 162 Mass. 66, 37 N. E. 770, 25 L.R.A. 157, 44 Am. St. 335, 166 Mass. 492, 44 N. E. 611, 33 L.R.A. 844, 55 Am. St. 417; Transit v. Venable, 105 Tenn. 460, 58 S. W. 861; Santa Fe Pacific R. Co. v. Holmes, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. ed. 1094, and McCabe & Steen C. Co. v. Wilson, supra.

While the facts in the cases we have cited are different in some respects from those of the case at bar, yet the controlling principle seems to be the same, which is that one who directly causes an injury to another may be his fellow servant in the broadest sense of that term, but not such within the rule which exempts the master from liability. Wood, Master & Servant, §§ 435, 436.

Where a master reserves to himself the performance of a particular act, he cannot avoid liability for its nonperformance by delegating the duty to another. One employs another, and agrees to furnish him tools and instrumentalities, to another he delegates the duty of procuring the tools and instrumentalities. If a defective instrumentality is selected and furnished by this last servant, and injury results to the servant using the same, the master is liable. Again, one is employed by a master who undertakes to furnish him with a safe place to perform his duties, to provide the place another is employed by the same master. If such second employee negligently performs his duty, and his fellow servant is injured thereby, the master is liable.

In both of these instances the injured servant and the negligent servant are coemployees, in that they are engaged in a common employment, working with a common purpose, towards a common result, and, rejecting the departmental theory and the difference in

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grades, we still find the master liable because the negligent servant is performing a duty of which he cannot divest himself. In all of these instances the contract of hiring might have been different. The servant might have undertaken to select his own instrumentalities, or have undertaken to secure the safety of the place upon which he was to work; but where the master undertakes that duty he at once assumes the burden of the proper performance. So here the defendant, having undertaken to transport the deceased from place to place, undertook to transport him safely. It, not he, selected the manner of such transportation, and undertook to make such manner safe. The contract on the part of the defendant in this case was not simply to permit the deceased to ride in its cars free to the places where he was to work; but it was an absolute contract obligation, based upon a valuable consideration, to transport the deceased, by such instrumentalities or agencies as it might select, to the place where he was to work. Whether the deceased was, while being so transported, strictly a passenger, is immaterial; for it is clear from the terms of the contract that it was the personal or absolute duty of the defendant to exercise due care to secure his safe transportation. It could not delegate this duty, so as to relieve itself from liability for a breach thereof.

We accordingly hold that the negligence of the engineer and conductor, which caused the collision whereby the deceased was killed, was the defendant's negligence, and that the trial court erred in ordering judgment for it notwithstanding the verdict.

Ordered that the order appealed from be, and it is, reversed, and the case remanded, with direction to the district court, to cause judgment to be entered for the plaintiff upon the verdict.

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W. C. SHERWOOD v. C. E. LOVETT.[1]

December 23, 1910.

Nos. 16,772—(104).

Agreement for division of broker's commission valid.

A real estate dealer reported to another dealer that he had a prospective purchaser for property listed with the second dealer for sale. It was agreed that, if a sale was effected to such prospective purchaser, the second dealer would divide equally the commission he was to receive from the owner of the property. The second dealer then executed in due form an executory contract for the sale of the property, wherein the terms of sale were all definitely stated. The name of the purchaser was not disclosed, and was not inserted in the contract; the agent being named as vendee. The dealer so procuring the contract of sale was interested as purchaser with the undisclosed party, and this fact was not disclosed. The contract was subsequently carried out by the owner of the property, with full knowledge on his part and on the part of his agent of that interest. The owner paid the full commission to his agent. *Held*, that the agent procuring the contract of sale to the undisclosed prospective purchaser was not an agent of the owner of the property, nor of the agent having the property for sale, and that the agreement for a division of the commission was valid.

No reversible error.

Record examined, and found to present no reversible errors.

Action in the district court for St. Louis county to recover $875, one-half the commission upon a sale of real estate. The facts are stated in the opinion. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for $922.40. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

[1]Reported in 129 N. W. 141.

[Note] Validity of broker's agreement to divide commission with another, see note in 45 L.R.A. 40.

Right to commissions where two or more real-estate brokers acting for the same person are instrumental in effecting sale of property, see note in 23 L.R.A. (N.S.) 164; and note in 27 L.R.A. (N.S.) 195.

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W. J. Stevenson and *Henry F. Greene,* for appellant.
H. J. Grannis, for respondent.

BROWN, J.

The facts in this case are substantially as follows:

One Potter, a resident of the state of Ohio, was the owner of certain real property situated in this state. Defendant, Lovett, was his agent, residing at Duluth, with authority to sell the same. R. M. Hunter was a real estate agent, residing at Duluth, and doing business under the firm name of J. C. & R. M. Hunter. Plaintiff was a real estate dealer, also residing at Duluth. Hunter and plaintiff were familiar with the Potter property and its value, and entered into an arrangement between themselves to obtain an option or executory contract for the sale thereof, with the view of a possible subsequent sale to some third person, and to divide equally the profits made.

In pursuance of the arrangement, Hunter went to defendant, the agent of the owner of the property, and informed him that he (Hunter) had a prospective purchaser, and asked for terms of sale, and whether defendant would divide his commission if Hunter effected the sale. Defendant named $65,000 as the selling price, which was acceptable to Hunter, and defendant agreed to divide with Hunter the commissions to be paid by the owner of the property if the sale was made. A contract for the sale of the property was then entered into. Hunter stated to defendant that the proposed purchaser did not care to have his name known for the present, and the contract was made out in the name of "J. C. & R. M. Hunter, Agents, Purchaser." The contract fully specified the terms of sale, and fixed sixty days within which it should be carried out by the delivery of the deed, abstract, and payment of purchase price. Defendant had no information at this time that Hunter was interested as a purchaser of the property.

The contract of sale was extended on two different occasions, and before the expiration of the last extension Potter, the owner of the land, died. Subsequent to his death the contract was carried out by the executors, and the property deeded to Augusta Berg, who in turn

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executed a mortgage thereon to secure the deferred payments. It was, however, known and understood that plaintiff was the real purchaser, that Hunter was interested therein with him, and the closing of the transaction took this form, so that plaintiff could avoid becoming personally liable upon the mortgage. It was fully understood, both by the executors of the estate and by defendant, their agent, that Hunter and plaintiff were both interested as purchasers some time before the transaction was closed, and it was finally consummated with full knowledge of that fact. Plaintiff and Hunter hoped and expected to make a profit on a resale of the property, but there is no evidence that any such profit was in fact made.

Subsequent to the transaction Hunter assigned to plaintiff his contract with defendant for one-half the commission paid by the Potter estate, and this action was brought to recover thereon. A verdict was returned for plaintiff, and defendant appealed from an order denying his alternative motion for judgment notwithstanding the verdict or a new trial.

1. It is the contention of defendant that Hunter became by the transaction with defendant an agent for the sale of the property, and as such charged with all the duties and obligations incident to that relation, and, having a prior agreement with plaintiff to share in the profits of a resale, which he concealed from defendant, could not enforce the agreement for a division of defendant's commission, and nothing, therefore, passed by his assignment of the contract to plaintiff; in other words, that the evidence conclusively shows that Hunter was secretly attempting to obtain a commission or profit from both parties while acting as the agent of each—citing Webb v. Paxton, 36 Minn. 532, 32 N. W. 749, Smitz v. Leopold, 51 Minn. 455, 53 N. W. 719, Merriam v. Johnson, 86 Minn. 61, 90 N. W. 116, and other similar cases. In this we are unable to concur.

Hunter was not clothed by the defendant, or the owner thereof, with authority to sell the property. After his arrangement with plaintiff, by which they expected to be able to make a resale after purchasing from Potter, Hunter stated to defendant, the agent of the owner, that he had a prospective purchaser, but did not disclose his name. Plaintiff was in fact that person. After discussing the

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subject, defendant executed to Hunter an enforceable executory contract for the sale of the property, which after one or two extensions was finally carried out. This clearly was not vesting in Hunter authority to go out upon the market and look up purchasers, nor was he under any obligation to do so. He was vested with no discretion in the premises whatever. He was authorized to complete the particular transaction, and to secure the performance of the executory contract of sale, on the terms there prescribed, but was under no obligations to look for other purchasers, or to make more advantageous terms of sale. His sole adverse intent was in the hope and expectation that a sale might be made under the authority of the contract, or after plaintiff became the owner, which would inure to his benefit. To this extent he was interested as a purchaser. But his hopes were not realized. No profits were made by a resale.

Under such circumstances, it cannot well be held as a matter of law that Hunter violated any duties owed by him to defendant or to Potter, or that he was by the transaction placed in a position of trust or confidence toward them. The fact that he was interested as a purchaser did not deprive him of the right to share in defendant's commission as agreed upon. The full commission was paid to defendant, and the sale was brought about through the efforts of Hunter, and completed with full knowledge of his interest therein. He therefore earned the agreed compensation. Remple v. Hopkins, 101 Minn. 3, 111 N. W. 385; Selover v. Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344. It follows that the court properly refused defendant's request for a directed verdict.

2. The trial court submitted the issues to the jury, and permitted them to determine what relation Hunter bore to defendant and Potter, charging them that if he was their agent, and as such was vested with discretionary authority respecting a sale of the property, he would not be entitled to share in defendant's commission. We have examined the charge of the court, and discover no error therein of which defendant can complain. The court, on the authority of Remple v. Hopkins, supra, would have been justified in directing a verdict for plaintiff. The controlling facts being practically un-

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disputed, Hunter's right to the agreed division of defendant's commission is fully sustained by that case.

As this disposes of the case, it becomes unnecessary to consider in detail the various assignments of error.

Order affirmed.

SEVER PETERSON v. ELIAS STEENERSON.[1]

December 23, 1910.

Nos. 16,781—(117).

Libel — privilege of public officers.

The general rule that libelous or slanderous statements uttered and published in the course of judicial or legislative proceedings are absolutely privileged does not extend or apply to public officers in general.

Same — report of public officer.

Libelous publications, contained in reports of public officers other than in judicial or legislative proceedings, are only qualifiedly privileged.

Burden of proof.

In such case the official character of the report prima facie protects the officer, and the burden is upon the person claiming to have been libeled to prove the falsity of the report and the malice of the author thereof.

Action in the district court for Polk county to recover $10,000 damages alleged to have been sustained by plaintiff because of his removal from office as a rural mail carrier through the malicious publication of false charges against plaintiff. The complaint alleged, among other things, that "the defendant above named wrongfully and maliciously set about to effect the removal and discharge of this plaintiff from his appointment as such mail carrier, and in order to effectuate such removal and discharge the defendant above named on the 29th of May, 1909, maliciously, wantonly and falsely made, published and preferred certain false, malicious and fraud-

[1]Reported in 129 N. W. 147.

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ulent charges of and concerning this plaintiff to the postmaster general at Washington, D. C., which charges so made by the defendant against this plaintiff were to said defendant made in writing and were in words and figures as follows" (here follow the charges verbatim).

From an order Watts, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Reversed.

W. E. Rowe, for appellant.

A. A. Miller, for respondent.

BROWN, J.

Appeal from an order sustaining a general demurrer to plaintiff's complaint. The complaint alleges that during the times stated therein plaintiff was a duly appointed, qualified, and acting rural delivery mail carrier of the United States Post Office Department, stationed at Crookston, this state; that defendant was the duly qualified and acting postmaster at Crookston; that during the early part of the year 1909 defendant set about to secure the removal of plaintiff from his position as rural carrier, and, to effectuate his purpose and design, maliciously, wantonly, and falsely made, published, and preferred certain false, malicious, and fraudulent charges of and concerning plaintiff to the postmaster general, at Washington, D. C. The charges so made are set out in the complaint, and impute to plaintiff misconduct in his office, and conduct detrimental to the best interests of the service, and were, if true, sufficient cause for his removal from office. The complaint then alleges that the charges so made were in all respects false and untrue, and known to defendant to be false when so made by him. It further alleges that, acting upon the charges, the Post Office Department removed plaintiff from office.

Plaintiff claims the right to recover, not for any injury to his name or reputation, but for the loss of his position. And though the action is not, strictly speaking, one for libel, the rights and liabilities of the parties respecting the question here presented are controlled by the rules of law applicable to that subject.

It is contended by defendant, and upon this theory the learned

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trial court sustained the demurrer to the complaint, that the report to the postmaster general, having been made by defendant in the due discharge of his official duties as postmaster, is absolutely privileged, irrespective of the motive prompting it. This contention presents the principal question discussed by counsel. We assume, in disposing of the case, the correctness of the contention that defendant made the report in the performance of his official duties.

It is a rule of general application in this country that libelous or slanderous matter published in the due course of judicial or legislative proceedings is absolutely privileged, and will not support an action, although made maliciously and with knowledge of its falsity, if pertinent or relevant to the issues in litigation or matter under inquiry. 25 Cyc. 376; Sheppard v. Bryant, 191 Mass. 591, 78 N. E. 394, 6 Am. & Eng. Ann. Cas. 802. The rule is broad and comprehensive, including within its scope all proceedings of a judicial nature, whether pending in some court of justice, or other tribunal, or officer clothed with judicial or quasi judicial powers, and all legislative bodies, state or municipal. In cases of other publications of libelous or slanderous matter, there may be a qualified privilege, depending upon the nature of the publication and its purpose, and the occasion of its publication. Within this class come communications, like that at bar, by a public officer in the discharge of his official duties. 25 Cyc. 387, and cases cited.

The privilege, however, is not absolute, and if the communication contain matters which are false, and known to be false, and be maliciously made, the privilege ceases, and recovery may be had. Though the rule is much broader in England, the courts of this country have been disinclined to extend it beyond judicial and legislative proceedings. An apparent departure was made by the supreme court of the United States in Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. ed. 780, where the postmaster general was held not liable for statements made by him in a report made in the performance of his official duties. There perhaps can be no criticism of that decision as applied to the head of one of the executive departments of government; but the propriety of making the rule universal, and extending it to all public officers, may well be

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doubted. See note to De Arnaud v. Ainsworth, 24 App. Cas. (D. C.) 167, 5 L.R.A.(N.S.) 163, where the authorities pertinent to the subject are collected. The Spalding case supports defendant's contention, if the rule there laid down is to be extended and applied to public officers generally.

We are of the opinion that the rule of absolute privilege should be confined to its present limited application, and should not be extended to a case like that at bar. The case is therefore controlled by the rule of qualified privilege, and by that defendant's liability must be tested. Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L.R.A. 440. The privilege being qualified, the fact that the communication was made to the postmaster general in the performance of defendant's official duties prima facie protects him, and the burden of proving the falsity of the charges and the malicious motive of defendant rests upon plaintiff. The scienter is sufficiently charged in the complaint, and within the rule and for the reasons stated we hold that a cause of action is stated. Wabash v. Young, 162 Ind. 102, 69 N. E. 1003, 4 L.R.A.(N.S.) 1091, and note.

The matters referred to in the fourth and fifth subdivisions of defendant's brief may arise upon the trial, but cannot be disposed of upon demurrer. The facts made the basis of the points there discussed do not appear upon the face of the complaint. Nor are we to be understood as holding that proceedings for the removal of public officers for misconduct are not as a matter of law in their nature judicial or without the rule of absolute privilege. Larkin v. Noonan, 19 Wis. 93. So far as appears from the allegations of the complaint, no such proceeding was pending, and we are bound to assume that the conduct of defendant was voluntary and malicious, and that the charges made were to his knowledge false and untrue. The complaint alleges that the charges so made were the basis of the order removing plaintiff from his position, and were therefore the proximate cause of the injury complained of. The nature of plaintiff's tenure of office, whether during good behavior, under the civil service rules of the federal government, and subject to removal only for cause, is a question proper for consideration on the trial, as bearing upon the measure of damages.

Order reversed.

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HERMAN STEINMUELLER v. A. J. WILLIAMS.[1]

December 23, 1910.

Nos. 16,817—(183).

Agent — receiving compensation from others than principal.

Where real estate is placed for sale in the hands of an agent, although the price and terms of sale are fixed by the owner, it is incompatible with the agent's duties to his principal to accept any payment as the agent of the purchaser.

Same — evidence.

The evidence is sufficient to sustain the jury in finding that appellant was the agent of the owner of the real estate purchased by respondent, and that without knowledge of such agency respondent employed him as his agent to negotiate a trade for the property.

Action in the district court for Clay county to recover $430, commission paid in a certain exchange of real estate in the belief that defendant was acting solely as the agent of plaintiff, while in fact he was acting also as the agent of the other party to the transaction. The answer was a general denial. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $400. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

William Russell and *Wm. R. Tillotson,* for appellant.

James M. Witherow, for respondent.

LEWIS, J.

The respondent and one Kiefer entered into a trade by which respondent deeded to Kiefer a farm and gave $5,000 cash to boot. Kiefer deeded to respondent a certain building and saloon business

[1] Reported in 129 N. W. 145.

[Note] Effect of real-estate broker's acting for both parties on right to commissions, see note in 45 L.R.A. 44; and note in 24 L.R.A.(N.S.) 659.

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in the city of Moorhead. Appellant was the agent through whom the parties were brought together. Respondent paid appellant the sum of $430 commission, and brought this action to recover it, upon the ground that appellant was acting as the agent of Kiefer, which fact was unknown at the time. The court instructed the jury that a person acting as agent for another in transacting the business of his principal was required to act solely for and in the interest of the principal, and he was not permitted to receive compensation from a third party; that if appellant was acting as the agent of respondent in effecting the trade, and was at the same time acting as the agent of Kiefer, respondent was entitled to recover such commission as he may have paid to him without knowledge of such fact. The jury returned a verdict for respondent in the full amount, and appeal was taken from an order denying appellant's motion for judgment notwithstanding the verdict or for a new trial.

The record does not bear out appellant's claim that the evidence conclusively shows that appellant was a mere middleman. The property had been listed by Kiefer with appellant as a real estate agent, and he had it for sale; but, having heard that respondent would be willing to trade some farm land for such a property, he looked him up and interested him, and respondent agreed to give him a sum of $500 as his commission. Respondent testified that the arrangement was that appellant agreed to and did act for him, and that he expected him to make the best bargain he could for him, and that he had no knowledge, until after he had paid the amount which he now seeks to recover, that appellant also received compensation from Kiefer. The question was in dispute, and was correctly submitted to the jury.

The rule is that where real estate is placed in the hands of a person to sell, as agent for the owner, although the price and terms of sale are fixed by the owner himself, yet it is incompatible with the agent's duties to his principal to accept any payment as agent also of the purchaser. Webb v. Paxton, 36 Minn. 532, 32 N. W. 749. The distinction between this kind of a case, and one where a real estate agent or broker is employed simply to bring the parties together, is pointed out in Hobart v. Sherburne, 66 Minn. 171, 68

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N. W. 841. It is the well-settled rule, upon grounds of public policy, that an agent or vendor cannot assume the essentially inconsistent and repugnant relation of agent for the purchaser. Turner v. Fryberger, 94 Minn. 433, 103 N. W. 217, 110 Am. St. 375.

Affirmed.

HATTIE CLARK v. SCANDINAVIAN-AMERICAN BANK OF ST. PAUL.[1]

December 23, 1910.

Nos. 16,829—(159).

Injury to passenger in elevator — evidence.

Personal injury action to recover for damages alleged to have been sustained by the negligence of the defendant in operating its passenger elevator while plaintiff was in the act of alighting therefrom. Verdict for $2,417, which was reduced to $1,500. *Held*, the evidence sustains the verdict. There were no reversible errors in the ruling of the court as to the admission of evidence, nor in its charge, nor in its order providing for a reduction of the verdict, instead of absolutely granting a new trial.

Action in the district court for Ramsey county to recover $5,426, damages for personal injuries received while in the act of leaving a passenger elevator owned and operated by appellant in a certain office building. The facts are stated in the opinion. The case was tried before Brill, J., and a jury which returned a verdict in favor of plaintiff for $2,417. From an order granting defendant's motion for a new trial, unless plaintiff would consent to a reduction of the verdict to $1,500, it appealed. Affirmed.

[1]Reported in 128 N. W. 1114.

[Note] Liability for injury to elevator passenger, see note in 2 L.R.A.(N.S.) 744.

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Harris Richardson and *Harold C. Kerr,* for appellant.
S. J. Donnelly and *D. E. Dwyer,* for respondent.

START, C. J.

On July 7, 1909, the plaintiff, a woman forty-eight years of age, was injured while in the act of leaving a passenger elevator in the possession and control of the defendant in its bank building. She brought this action in the district court of the county of Ramsey to recover damages for her injury, on the ground that it was sustained by the negligence of the defendant. Verdict for her in the sum of $2,417. The trial court made its order denying the defendant's motion for a new trial, upon condition that the plaintiff consents to a reduction of the verdict to the sum of $1,500. She so consented, and the defendant appealed from the order.

1. The defendant's first contention is that the verdict is not sustained by the evidence. There was evidence tending to show that the plaintiff entered the elevator from the third floor of the building, to go to the lowest or ground floor; that when the elevator reached that floor the operator so stopped it that the top of the floor of the elevator was an inch below the level of the ground floor, upon which was an iron threshold or sill, which projected over the elevator pit some two inches; that when the elevator so came to a stop the operator called out "Ground Floor," and the doors of the elevator were open, there were two of them; she did not see the operator open either, but she did not open either of them; and, further, that the plaintiff, who was the first one to get out, while in the act of leaving the elevator, caught her foot in some way under the projection, which caused her to be thrown out and upon the ground floor of the building, and thereby she was injured. There was other evidence tending to show that the plaintiff was not the first one to leave the elevator; that the operator did not call out "Ground Floor," nor open the doors, which opened only from the inside; that he was in the act of bringing the elevator to a level with the ground floor, when some one other than the operator opened the door, and the plaintiff walked out, and in doing so stumbled and fell. The evidence in material particulars was conflicting, and a consideration of

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the whole thereof satisfies us that the verdict is sustained by the evidence.

2. The defendant further claims that it was reversible error for the trial court to instruct the jury to the effect that if the elevator doors were opened by some one other than the operator, but with his knowledge or permission, it would be his act. The reason urged why this was error is that there was no evidence tending to support any such hypothesis. The operator was in the control of the elevator. It was his duty to exercise due care to see that the doors were not opened until he had brought the elevator into a position that would enable the passengers to alight in safety.

He testified that people were accustomed to open the door when they went down in the elevator; that they generally did so, but he told them "that they shouldn't" open the door. He further testified in this connection as follows: "Q. Well, you didn't tell them that day? A. I didn't tell them—well— Q. No. Well, when was the first time you told anybody else, before you told it on the witness stand here, about some passenger opening it that way? A. I don't remember. Q. You remember talking with Mr. Dwyer about it, don't you? A. Oh, yes. Q. Did you tell him then a passenger opened it? A. Well, I didn't open the door." We are of the opinion that the testimony of the operator justified the instruction.

Other instructions of the court, and its refusal to give certain requested instructions, are also assigned as error; but a mere reading of the record clearly indicates that the court did not err in these respects.

3. We find no reversible errors in the rulings of the court as to the admission of evidence. The verdict, as reduced, is not excessive; nor did the trial judge abuse his discretion in providing for a reduction of the verdict, instead of making his order granting a new trial absolute. The damages awarded, and the evidence as to other issues, do not indicate a fair probability that the jury were influenced by passion or prejudice in determining the other issues. Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

Order affirmed.

O'BRIEN, J., took no part.

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STATE v. C. W. YOUNG and Another.[1]

December 23, 1910.

Nos. 16,838—(38).

Contempt of court — charge of misconduct against grand jury.

The presentation of a petition to the court praying for the resubmission of certain charges of a violation of the law, which had been theretofore submitted to the grand jury and by that body considered and reported back to the court that no indictments were found, *held*, since the report of the grand jury that the charges had been considered and no indictment found was a final determination of the same so far as concerned the reporting jury, not a contempt of court, though the petition contained groundless charges of misconduct on the part of the grand jury.

Petition to the district court for Ramsey county by C. W. Young and John A. Vye alleging failure, neglect, misconduct and misconception of duty on the part of the grand jury in relation to a complaint presented to that body against certain persons for violating the Sunday liquor ordinance; alleging similar failure and miscarriage of justice on the part of other grand juries, suggesting as the cause the method pursued in selecting the panel, and requesting the court to reinstruct this grand jury and resubmit these cases to this or another grand jury, and asking for a new method of choosing the panel in Ramsey county. Upon the affidavit of the members of the grand jury criticised, an order was obtained from Orr, J., directing the petitioners to show cause why they should not be punished for contempt of court. The petitioners made answer and the matter was heard before Orr, J., who found that C. W. Young and John A. Vye were guilty of contempt of court and fined them $50 each, and in default of payment they be committed to the county jail for a period of five days. From an order denying defendants' motion for a new trial, they appealed. Reversed.

Daniel W. Doty, for appellants.

Richard D. O'Brien and *Patrick J. Ryan,* for the State.

[1]Reported in 129 N. W. 148.

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BROWN, J.

Defendants in this proceeding were instrumental in detecting and bringing to light alleged violations in the city of St. Paul of the statutes prohibiting the sale of intoxicating liquors on Sunday. They reported several cases of such violation to the county attorney of Ramsey county, and that officer in the discharge of his duties submitted the same, together with the evidence, to the grand jury at the October, 1909, general term of the district court. The grand jury, after duly considering the evidence and charges made, reported to the court that no indictments were found.

Thereafter, and while the grand jury was still in session, and in discharge of their duties in the consideration of other matters, defendants, through their attorney, presented to the court a lengthy petition, in which it was asserted, in substance and effect, that the grand jury had failed to give proper consideration to the charges mentioned, had refused to hear all the evidence attainable, and had grossly failed in the performance of their duties. The petition contained severe and pointed criticisms of the jury, and in effect charged a wilful neglect of duty. The petition was signed by the attorney, though made on behalf of defendants and verified by them, and prayed for an order resubmitting the charges mentioned to the same or another grand jury. A subsequent motion to strike the petition from the files was denied by the court. The court took the petition under advisement, and after several days of careful consideration of its allegations in effect found them true and ordered the matters resubmitted to the grand jury at the January, 1910, term of the court. The petition was presented and filed with the court on the twelfth day of November, 1909, and the order of resubmission was duly entered on the eighteenth of the same month.

Thereafter, on November 30, certain members of the grand jury presented and filed with the court an affidavit, in which they charged and asserted that many of the statements of fact contained in the defendants' petition for a resubmission of the matters to another grand jury were untrue; that by filing said petition defendants attacked the dignity and integrity of the court and the grand jury thereof, and by insult and aspersions tended to bring the court and

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the grand jury into discredit and disrepute, thereby obstructing and interfering with the administration of justice in said court. The affidavit prayed for the apprehension of defendants and their punishment for contempt of court, and that the defendants' petition be stricken from the files.

The court gave this affidavit due consideration, and on the sixteenth day of December, 1909, issued an order citing defendants to appear and show cause why they should not be punished for contempt in presenting and filing therein their said petition. The order to show cause came on for final hearing December 29, and the court thereafter, on February 11, 1910, made an order adjudging defendants guilty of contempt, and imposed upon each a fine of $50 or five days in jail. Defendants appealed from an order denying a new trial.

It is elementary that publication in newspapers, or impertinent, scandalous, or contemptuous language inserted in pleadings, affidavits, or petitions filed in court, concerning a pending cause, by which it is sought to influence the action of the court therein, and prevent a fair and impartial hearing, thus embarrassing the due administration of justice, constitute a contempt of court, and may be summarily punished. But by the weight of authority the rule does not apply to proceedings which have been fully terminated, and brought to a close by final decision. And however strong and abusive a criticism of a court or any of its officers may be, having reference to past proceedings, the remedy is not by an exercise of the arbitrary power of punishment for contempt, but by an action, civil or criminal, for libel or slander, as the case may be. State Board of Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A. (N.S.) 585, and cases there cited.

The rule is so clearly and tersely stated in the opinion referred to that further discussion would shed no additional light upon the subject, and we have only to inquire whether the proceedings before the grand jury with reference to the matters here in question were brought to a final termination, and the jurisdiction of that body to proceed futher therein ended, by the report to the court that the matters had been duly considered, with the result that no indictments

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were found; for, if thus finally terminated, the court below had no jurisdiction to proceed against defendants for contempt of court. In that event the case comes within the rule that the decisions and proceedings of courts and their officers are, after the final termination thereof, open to criticism by the public press or by individuals, a privilege guaranteed by the constitution, but subject to responsibility in an appropriate action for an abuse of the same.

We are of the opinion that the final report of the jury that the matters had been considered and no indictments found finally ended the proceedings before the jury, and that the presentation of the petition by defendants, asking for a resubmission thereof, was not a contempt of court. The petition, in so far as a criticism of the action of the jury, concerned a past transaction, and does not come within the rule applicable to a pending proceeding.

Our statutes (section 5295, R. L. 1905) provide that if "twelve grand jurors shall not concur in finding an indictment or presentment, the charge shall be dismissed, but such dismissal shall not prevent its being again submitted to a grand jury as often as the court shall direct." Under this statute it is clear that a report to the court of no indictment found in a matter which has been regularly submitted to and considered by the grand jury is a complete termination of the authority of the jury in respect to the particular charge so reported upon. The matter of resubmission rests with the court, and if no order to that effect be made the court has no alternative but to dismiss the charge, when application is made therefor. It cannot be said, therefore, that the petition in question, asking a resubmission of the matters, tended in any way improperly to influence the jurors, or to embarrass them in the discharge of their duties. The learned trial court was very careful to avoid that effect; for, instead of ordering a resubmission to the same grand jury, the charges were directed submitted to another jury at a succeeding term of court.

The grand jury is but a branch or department of the court, with limited and clearly defined authority, and in this respect occupies a position substantially like the petit jury. If a charge of misconduct, or even corruption, on the part of a petit jury in arriving at a

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verdict, made in affidavits in support of a motion for a new trial, would not constitute a contempt of court, and clearly it would not, then the same rule must apply to the grand jury respecting criticism or censure for proceedings had and taken and finally ended by that body; and, though a baseless charge of misconduct or corruption on the part of either jury in respect to matters pending before them would naturally tend to embarrass the members thereof in the discharge of their duties, and hence interfere with the orderly administration of justice, no such effect naturally or otherwise follows from a criticism respecting matters theretofore finally ended and taken out of the further jurisdiction of the jury.

The improper interference with the administration of justice is the foundation of all contempt proceedings, and this does not follow from facts like those at bar.

The case is substantially like Storey v. People, 79 Ill. 45, 22 Am. Rep. 158. In that case the grand jury had reported an indictment against Storey, the publisher of a newspaper, who immediately thereafter composed and published in his paper a severe arraignment of the jury, while they were still in session, charging corruption and misconduct. It was held that the authority of the grand jury in the particular matter terminated with the return of the indictment, and the editor was not subject to punishment for contempt, and that the remedy against him was either a civil action for damages or prosecution for criminal libel. The decision has been widely cited with approval by other courts. 4 Notes to Ill. Reports, 315. See also collection of authorities in 17 L.R.A.(N.S.) 572–585.

There can be no substantial distinction, so far as concerns a termination of the authority of the grand jury, between a case where an indictment is returned and one where the jury reports no indictment as the result of their consideration of the charge. In either case, in the absence of express directions from the court, the authority of the jury ceases with the report.

We therefore hold that the conduct of defendants in the presentation of the petition for resubmission of the matters to another grand jury concerned a proceeding not then pending before the jury, and there was no contempt in its presentation.

Order reversed.

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IRA BARNES v. HERMIS L. SPENCER.[1]

December 23, 1910.

Nos. 16,859—(105).

Action for wages — verdict sustained by evidence.

Evidence considered, and *held* to sustain verdict.

Evidence — charge to jury.

Certain rulings upon evidence and instructions to the jury examined, and found without reversible error.

Action in the municipal court of Minneapolis to recover $287.56. The amended answer alleged that plaintiff performed services for defendant amounting in all to $810.74, of which sum he had been paid $736.55, leaving a balance of $74.19; for a defense to the second and third causes of action defendant alleged that he had received of plaintiff $37.50, of which plaintiff had been paid all except the sum of $17.50. For a further defense and counterclaim defendant alleged that in the years 1906, 1907 and 1908 defendant paid, furnished and advanced certain sums amounting to $80.15; that on or about February 12, 1909, defendant tendered to plaintiff the sum of $28.40, the balance due, which plaintiff refused. The case was tried before Charles L. Smith, J., and a jury which returned a verdict in favor of plaintiff for $180. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

John J. McHale, for appellant.

Anthony T. Grotte, for respondent.

O'Brien, J.

Plaintiff sued for a balance claimed to be due him for wages as teamster, and also for certain advances. Defendant answered, denying rate of wages, the total time of employment claimed, alleging additional credits, and finally admitting a small balance due plain-

[1]Reported in 129 N. W. 140.

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tiff. The action was submitted to a jury in the municipal court, and a verdict for considerably less than plaintiff's claim, but more than the admitted balance, was returned in plaintiff's favor. Defendant appeals from an order denying a new trial.

1. In denying a new trial the court made his memorandum a part of the order, from which it appears that this is the second verdict rendered in this case in plaintiff's favor; a former one having been set aside as against the evidence. We will not attempt to recite the evidence before us in the present record. It was conflicting as to the rate of wages, the exact period of plaintiff's employment, and the credits to which defendant was entitled. The detailed accounts of both parties were before the jury, and we agree with the trial judge that the evidence would sustain a verdict in favor of either party. The discretion of the court has once been exercised in defendant's favor, and there is in the record evidence abundantly sufficient to prevent us from overruling the judgment of the trial judge in finding the evidence sufficient to sustain the verdict.

2. Plaintiff claimed an express contract as to wages. He was permitted to testify as to the character of his work, and perhaps additional work, such as choring. This was not error, as the probability of the contract claimed was an element proper to be considered by the jury.

3. Defendant owned several teams of horses, which he was accustomed to let to lumber companies during the logging seasons. One of the disputed questions was in whose employ, the defendant's or the logging company's, plaintiff was during these periods. Plaintiff testified to continuous employment by defendant until February, 1909; but his claim for wages, as contained in the bill of particulars furnished by him, ended December 5, 1908, upon the theory that, having been paid after that date by the lumber company the full wages claimed, he should not charge the same against defendant. Notwithstanding this, defendant insisted upon the introduction of a written contract between the lumber company and defendant, from which it appeared the contract was solely with reference to teams, and did not include plaintiff's services. The periods for which plaintiff claimed a right to recover were not included in the con-

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tract offered. The contract was also with a company different from those to whom defendant had previously let his teams. The terms of those prior contracts had been given; so, while we think this written contract was admissible, for the same reasons that plaintiff was permitted to show the character of his work—i. e., to show the probabilities of the situation—its evidentiary value was so slight we do not consider its rejection reversible error. Anderson v. Burlington, C. R. & N. Ry. Co., 82 Minn. 293, 84 N. W. 1021; Crowley v. Burns Boiler & Mnfg. Co., 100 Minn. 178, 110 N. W. 969.

4. Plaintiff, during part of the time he claims to have been in defendant's employ, was in charge of defendant's team or teams thus let to a lumber company. As we understand the record, plaintiff credited the defendant with payments of wages during those periods at the rate he claimed to be entitled to from defendant, $40 per month; the payments having been actually made by the lumber companies direct. The court instructed the jury, this being true, it was immaterial what wages defendant actually received while in the woods. We see no error in this, as defendant claimed no additional credit for this time. Neither was it error to say plaintiff claimed the lumber companies paid his wages to avoid liens. The statement seems immaterial.

One ground upon which a new trial was asked was newly-discovered evidence, showing plaintiff actually received, while employed by the lumber company, $45 per month, instead of $40 per month, as claimed. While this would tend to contradict plaintiff's testimony, we are not prepared to say there was error in holding defendant had not shown sufficient diligence in obtaining the evidence.

Order affirmed.

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J. A. McBRADY v. MONARCH ELEVATOR COMPANY.[1]

December 23, 1910.

Nos. 16,895—(165).

Construction of grain buyer's contract — new trial.

Respondent was employed as agent for appellant at its elevator in the village of Barry, and his duty was to purchase grain, store it in the elevator, and ship it out in car lots, upon the order of appellant; and he brought this action to recover the sum paid by him to cover shortage claimed to have been fraudulently represented to exist by appellant. *Held:*

1. The contract was that respondent should inspect and weigh the grain, make the necessary dockage for dirt or foreign matter, and issue tickets for the net amount of grain received. Respondent was held responsible for the gross weight at the terminal points of shipment, and, in estimating whether or not there was a shortage in any particular kind of grain between the gross amounts at the elevator and at the terminal points, respondent was entitled to a credit of overages in any other kind of grain received and shipped.

2. There was evidence sufficient to sustain a finding that there was a shortage of six hundred sixty-nine bushels of wheat; but there was also evidence as to overages in flax, barley, and oats sufficient to reduce the total value of the shortage to $133.86.

3. The evidence was sufficient to sustain the jury in finding that respondent paid to appellant the sum of $516.18, because of appellant's fraudulent representations that respondent was indebted to it in that amount for shortage of grain shipped.

The jury returned a verdict of $650.04 for respondent, being the full amount of the shortage claimed by appellant; and upon appellant's motion for a new trial the court granted the motion, unless respondent would consent to a reduction of the verdict to $516.18. Appellant was not prejudiced by the order.

Action in the district court for Big Stone county to recover $650.04, alleged to have been paid on account of fraudulent representations. Among other matters, the complaint alleged that the claim of shortage by defendant was wholly and unconditionally

[1]Reported in 129 N. W. 163.

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false and untrue, and was known by defendant to be false and untrue at the time the same was made, and in fact there was no shortage in plaintiff's grain account whatever; that plaintiff did not return to Minnesota until 1904, at which time upon investigation he found the platform scale at the elevator at Barry was defective and would not weigh accurately, and was so constructed that on heavy loads it would overweigh and show a greater quantity of grain than that actually weighed; that plaintiff at different times demanded a statement and accounting for the claimed shortage upon which had been collected the sum of $650.04, but defendant at all times refused to furnish plaintiff any information, or to show him any of the books or records, or to account to him in any manner, or give him any information relative to the basis of the claim. It also alleged that in the year 1907, upon more careful investigation, he ascertained for the first time that the claim of shortage on behalf of defendant was wholly false and untrue.

The answer alleged that under the contract of employment plaintiff agreed to guarantee and did guarantee the correctness of the weights of all grain purchased by him during his employment, and a part of his duty was to ascertain each day whether the scales provided by defendant for the weighing of grain were in a proper state of adjustment, and whether the same were accurately weighing, and to report daily to his employer the condition of the scales; that he did report daily concerning the scales; that relying upon the reports of the amount of grain purchased by plaintiff as furnished by him to defendant, and the weighing and inventory of the grains so turned over to defendant at the termination of plaintiff's employment, and in good faith relying upon the fact so appearing that plaintiff had failed to account for various kinds and quantities of grain, defendant presented a statement of the amounts and kinds of grain for which plaintiff had failed to account and demanded an accounting; that thereupon plaintiff agreed with defendant that the amount of plaintiff's delinquency was $650.04, whereupon plaintiff voluntarily paid that sum to defendant in satisfaction of the claims against him; that after the discovery of the shortage, plaintiff especially requested defendant to refrain from presenting its claim to

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the surety company, agreeing to pay the claim in full; that acting upon this request, defendant refrained from reporting the shortage and released the surety company from all liability on its bond; that the time within which an action upon the bond could be brought had long since expired, and that, if plaintiff should recover in this action, defendant would be deprived of its remedy against the surety company.

The reply alleged that plaintiff did make regular reports to defendant; that the scales at all times appeared to be correct and when not loaded would balance accurately, but by reason of the negligent and defective manner in which defendant had caused them to be set into the elevator, and by reason of the defective mechanical construction, they would not weigh accurately when heavily loaded; that the defect was not such as could have been determined by plaintiff by any inspection that he could have made, and there was nothing about the operation of the scales to give notice or warning, or furnish any information to the party using them that they were not working properly and accurately.

The case was tried before Flaherty, J., and a jury which returned a verdict for plaintiff for the amount demanded. The amount of the verdict was thereafter reduced to $253.30 and again changed to $516.18. From the judgment entered pursuant to the verdict as reduced, defendant appealed. Affirmed.

Purcell & Divet and *A. B. Kaercher,* for appellant.

Cliff & Purcell, for respondent.

LEWIS, J.

Respondent was in the employ of appellant from August to November 15, 1902, as agent in charge of its elevator at Barry, Minnesota. It was his duty to buy grain from the farmers, store it in the elevator, and ship it out in car lots, according to the order of appellant. The action is to recover money paid on misrepresentation of appellant. Respondent was compelled to resign his position November 15 and go to North Dakota, for the purpose of living on the homestead upon which he had previously filed, and after reaching Dakota, a point over four hundred miles from Minneapolis, he was

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informed by appellant that he was indebted to the company in the sum of $650.04, for shortage on account of the difference in amount of grain taken in at the elevator and the amount received at the terminal points; that such representations were false, and made for the purpose of inducing respondent to pay the amount claimed at a time when he was unable to examine and prove the facts, but that, relying on such representations, he paid the money, with the intention of subsequently ascertaining the facts. Respondent was under bond to a surety company for his faithful conduct as an agent, and for the purpose of protecting his reputation from being discredited by the bonding company he made the settlement, subject to his right to a subsequent examination of the books and records.

The complaint charged that the scales upon which the grain was weighed when received in the elevator were imperfect, and for that reason there was an apparent shortage, when in fact there was none. The jury returned a verdict of $650.04, the total amount of shortage claimed by appellant and paid by respondent, whereupon, on motion for a new trial by appellant, the court reduced the verdict, first, to the sum of $253.30, and later modified that order, and reduced it to $516.18, for which amount judgment was entered, and appeal was taken.

The essential issues may be disposed of as follows: (1) What was the contract between the parties? (2) What, if any, shortage was established by the evidence? (3) Was there any evidence reasonably tending to support the claim that appellant induced respondent to make settlement and pay the amount of $650.04 by falsely representing to him that the grain shipped was short in that amount? (4) Did the court err in granting a new trial, unless respondent would consent to a reduction of the verdict to $516.18?

It is claimed by appellant that the contract was that respondent should be charged with the net amount of the grain received at the terminal points, and not the gross weights; that respondent was responsible for the difference in dockage between the receiving and delivering points, and was to stand the loss. Respondent claimed that he was employed as agent of appellant on a salary, and that his

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responsibility ended after using his best judgment in inspecting the grain received, and that appellant assumed the loss, if any, on account of difference in dockage. There is no ground for argument on this question. The correspondence between the parties with reference to the method of dockage fails to support appellant in this position, and the surety bond recognized gross weights as the proper basis for estimating shortage. Besides, such a contract as appellant insists on would be so manifestly harsh and unjust that it would require clear evidence to show that respondent had subjected himself to such terms.

2. According to appellant's letter of December 20, respondent was charged with a shortage of 669 bushels of wheat at 63 cents per bushel, and 258.4 bushels of flax at $1.02 per bushel, and given credit for 37 bushels and 12 pounds of barley at 39 cents per bushel, and 83 bushels and 28 pounds of oats at 24 cents per bushel, making a total of $650.04. At the trial the evidence showed that there was at least a total shortage of 478 bushels and 50 pounds of wheat, and an overage of barley of 135 bushels and 22 pounds, and of oats 72 bushels and 9 pounds, and, further, that there was an overage of flax of 247 bushels and 38 pounds, instead of being a shortage of 258 bushels, as claimed by appellant. There are some differences in the amount claimed by the parties as to overages on oats and barley, and the amount of shortage on wheat. The real controversy was with reference to the flax. According to the gross weights, there was an overage of at least 247 bushels and 38 pounds of flax, which entitled respondent to a credit of $252.44. Therefore, while there was a shortage in wheat, there was no shortage in the entire account.

3. The court properly instructed the jury that, if they should find that appellant made the claim of shortage in good faith, in an honest interpretation of the contract, there could be no fraud, and respondent could not recover. This leads to an examination of the evidence as to what were the facts necessarily within the knowledge of appellant at the time of making the demand for payment of the flax. It appears that respondent kept no books at the elevator, except a stub book, upon which was noted the amount of the grain

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received and the name of the party to whom tickets were issued and a report of these was made to the head office at Minneapolis. Respondent handled no cash and paid for no grain. The tickets were presented at the bank or at a store in Barry for payment. All of the books and records showing the amount of grain received at the terminal points, and the amount of the dockage made by the state weighmaster, were in possession of appellant at its office in Minneapolis. There was no ground for claiming respondent was indebted for the flax. No explanation was given, unless it was the difference in dockage. The demand was without excuse, and considering the situation in which respondent was placed, and his inability to make an examination at that time, we think it fairly a question for the jury to determine whether the demand was not made with the intention of forcing respondent to pay a claim which appellant knew was without legal basis. Respondent's payment of the demand was consistent with a belief that the shortage claimed was the difference in the gross weights between the shipping and the terminal points; and, not being in possession of all the facts, he had the right to assume that the amount demanded was correct. This was not a voluntary payment. A payment induced by the fraud of the payee may be recovered. Schaller v. Borger, 47 Minn. 357, 50 N. W. 247.

4. The court instructed the jury as follows: "Now, gentlemen of the jury, if you find as a matter of fact, under the evidence, that there was an actual shortage as claimed by the defendant, and that the plaintiff paid over the money for the purpose of settling that and paying it, and squaring the matter up and adjusting the claim then presented to him and made by the defendant, * * * plaintiff could not recover here; and in fact the plaintiff does not claim, and no claim could be made on behalf of the plaintiff, that if there was a legitimate and actual shortage, and he paid it, that he could recover back any part of it, either the $650.04, or any part of it." Later on the court instructed as follows: "If the money was obtained by false and fraudulent representations made by the defendant to the plaintiff, and plaintiff relied upon them to his damage, the plaintiff is entitled in this action to recover back whatever money

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he paid to defendant that defendant was not properly entitled to under its contract and agreement with this plaintiff." And again: "If you find that issue in favor of plaintiff, then you would return a verdict in favor of the plaintiff for such sum or such part of the $650.04 as you find that he was improperly led to part with at the time of the settlement by reason of the false and fraudulent representations made. In any event, he could not recover here anything, in excess of $650.04, and he cannot recover here anything, except he satisfies you by a fair preponderance of the evidence that he was led and induced to part with the money paid over by reason of the improper and unlawful practices of the defendant."

If there was a dispute about the amount of shortage, and respondent paid the sum of $650.04 voluntarily, for the purpose of settling the dispute, he could not recover, although he may have paid for more than the actual shortage. But it does not necessarily follow that he cannot recover, simply because he was owing some part of the amount which he paid. If he was induced to part with $516.18 by reason of appellant's false representations as to the flax, then he was not estopped from recovering that amount, simply because he voluntarily paid what was due for shortage on wheat. No exceptions were taken to the charge, and although in the first part quoted the court stated that respondent could not recover any part of the $650.-04, if there was any shortage, it was followed by the instruction that respondent could recover any part which he paid by reason of fraudulent representations. A finding by the jury that there was no shortage at all does not argue that they did not find that there was fraud as to the flax. Under the evidence and the instructions, the jury might have returned a verdict for $516.18, and the result is the same as though the court had instructed the jury that respondent could not recover any of the amount paid for actual shortage. We discover no error in the reduction of the verdict, and are of opinion that the evidence sustains the verdict as reduced.

Affirmed.

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CRYSTAL G. NOYES and Another v. JOHN E. OSTROM and Another.[1]

December 23, 1910.

Nos. 16,902—(109).

Promissory note — consideration.

Upon default of a contractor, the sureties upon his bond undertook the completion of his contract, and to borrow money from a copartnership executed their joint note. Even though one of the sureties, a member of the firm to which the note was given, had agreed to indemnify the other sureties against loss, a consideration for the note passed to each signer. Nor is any such surety signing the note entitled to be considered merely an accommodation maker.

Partnerships — common member of two — action between them.

When two copartnerships have a common member, neither firm may sue the other in an action at law, but may maintain an equitable action, in which the individual rights of all the members of both firms may be adjusted.

Counterclaim — answer states equitable defense.

A claim against an individual member of a firm cannot be offset against a debt due such firm. But an answer alleging that defendants became sureties upon a bond upon the representation of a member of the firm, now bringing suit, that he held as security sufficient property to meet any liability upon the bond, and that he would save defendants harmless from any liability thereunder, states an equitable defense, which, under the circumstances of this action, may be pleaded and shown.

Charge to jury — equitable relief.

It was error to instruct the jury that defendants were entitled to a verdict, if their contention was true that a member of the plaintiff firm had undertaken to protect them from loss under the bond. But under all the circumstances disclosed this is *held* to be an action in which either plaintiffs or defendants may be entitled to equitable relief; and, all persons interested being parties to the action, such relief may be granted to each as he may show himself entitled to.

Promise not within statute of frauds.

When one requests another to join him as surety upon a bond, and promis-

[1] Reported in 129 N. W. 142.

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es such other to save him harmless from loss upon the bond, the promise is an original agreement, and not within the statute of frauds.

Action in the district court for Marshall county by the executors of the last will and testament of Bolivar C. Gill and L. Lamberson against John E. Ostrom and August Lundgren to recover $1,166.53, balance claimed to be due upon a certain promissory note. The substance of the separate answers is stated in the opinion. The replies were general denials. The case was tried before Grindeland, J., and a jury which returned a verdict in favor of defendants. From an order denying plaintiffs' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Reversed, and new trial ordered, without prejudice to the right of either party to apply for leave to amend their respective pleadings, with a view to a trial and submission of the action in accordance with the views expressed in the opinion.

Brown & Eckstrom and *Charles Loring,* for appellants.

Martin O'Brien and *Julius J. Olson,* for respondents.

O'Brien, J.

At the time of the execution of the promissory note hereafter referred to, one Gill and plaintiff Lamberson were copartners under the firm name of Bank of Warren; Lamberson being the active manager in charge, and Gill residing in Illinois. Mr. Gill died prior to the commencement of this action. The executors of his will, who were authorized to continue to operate the bank with Lamberson, brought this action jointly with Lamberson as partners under the firm name.

One Rhinehart had a contract with the county of Marshall for the digging and construction of a ditch. The plaintiff Lamberson and the defendants became sureties upon a bond given by him to the county under the terms of the contract. Rhinehart defaulted in the performance of and abandoned his contract, and the sureties upon the bond undertook its completion. For this purpose the sureties borrowed money from the Bank of Warren, executing their promissory notes therefor. When the contract was closed, and the money

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received from the county applied to the notes, a balance remained due upon the note in suit, one-third of which balance was thereupon paid by Lamberson, and this action was brought to recover the remainder from the defendants.

The note in suit was signed upon its face by the defendants, and before delivery indorsed by Lamberson. Defendants answered separately, each setting up substantially the same defense, which was this: That, when it became necessary for Rhinehart to procure sureties upon his bond to the county, plaintiff Lamberson approached defendant Ostrom, and requested him as a favor and accommodation to him (Lamberson) to sign said bond as a surety; that he (Lamberson) had obtained from Rhinehart sufficient property to protect himself, and that he would at all times protect and save the defendant harmless from any and all liability as a surety upon the bond; that each of the defendants became a surety upon this promise and understanding; that upon Rhinehart's default the sureties became liable upon his bond, whereupon Lamberson requested and procured defendant Ostrom to take personal and active charge of the completion of the contract; that the note was executed solely for the purpose of obtaining money to complete the contract, and at the request of plaintiff Lamberson, for his accommodation, without any consideration whatever to either of the defendants, of all of which the Bank of Warren had knowledge and notice; further, that plaintiff Lamberson had received ample property from Rhinehart to meet the balance remaining due upon the note.

Upon the trial there was evidence as to the agreement claimed to have been made by Lamberson when the bond was signed. With reference to the giving of the note defendant Ostrom said: "A. After the ditch was abandoned by Rhinehart, we had talks in regard to it off and on at different times, as I remember it, but just exactly what the conversation was at that time I don't remember; but the gist of it was that we had to take hold of that work and complete it, because the captain had abandoned it." And again: "A. At the time the work was taken over, I went to Lamberson, and told him I would have to get money to carry on the work with, and pay for the men, and he suggested that we make out the notes for it, and we made out

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the note, and he asked me if I would sign it with him, and I told him 'Yes,' and after I signed it he requested me to go to Lundgren and ask him to sign, and I went to Lundgren and asked him to sign it. I believe Lundgren was on all the notes that I signed. Q. In response to his request that you go and ask Lundgren to sign it, you went and asked Lundgren? A. Yes, sir. Q. And Lundgren did sign the note after you requested him to do so? A. I believe so. I believe he was on all the notes. Q. Including this note sued on? A. Yes, sir. Q. Who asked you to sign this note? A. Lamberson. Q. Did you ever have any personal interest in this note? * * * A. Not any."

Lamberson denied making any agreement to hold the defendants harmless from any liability upon the bond. He admitted receiving from Rhinehart, about the date of the execution of the bond, some property, but claimed it was given to secure an entirely different debt, and had no connection with the ditch contract, and that he received from it no more than the amount of the obligation it was given to secure.

In submitting the case to the jury, the trial court gave the following instruction: "In order for the defendants to prevail in this action, they must establish the defense set up by a preponderance of the evidence. If you find that the defendants have [by] a preponderance of the evidence established that the agreement as claimed by them was made at the time the bond was signed, and that it was pursuant to that agreement and without any other consideration and simply to accommodate Mr. Lamberson that they signed the note in question, then your verdict must be for the defendants. On the other hand, if defendants have failed to so establish this, your verdict must be for the plaintiffs for the full amount claimed."

1. Defendants contend that the note was executed purely as an accommodation to Lamberson, who, they claim, was the only person ultimately liable upon the bond. Hence, it is said, they were merely accommodation makers of the note, against which, it having been given to the firm of which Lamberson was a member, they were entitled to interpose the defense of want of consideration. We have no doubt that counsel's position is correct, if it is true that there was

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no consideration for the execution of the note. It is also true, as claimed by defendants, that a copartnership does not occupy the same position with reference to a transaction of this sort as would a corporation, a legal entity entirely separate and distinct from the members who compose it.

But we think it is apparent that the copartnership did give a good consideration, inasmuch as it parted with the full amount of the note, and were the situation not complicated by the fact that Lamberson was a member of the firm, the question of how much of the amount so advanced went to benefit any one of the defendants would be entirely immaterial. In such case there would be no doubt that defendants would be liable, even though merely accommodation makers. Rea v. McDonald, 68 Minn. 187, 71 N. W. 11. But the defendants received consideration for the note. Eliminating for the present defendants' rights as between them and Lamberson, it must be remembered that they were primarily liable to the county of Marshall as sureties upon the bond which they executed. Upon the default of the contractor, they undertook the completion of his contract. It cannot be seriously questioned that it would be to their advantage to avoid this primary liability. The money advanced was to a greater or less extent for their benefit, to enable them to complete the contract. They were something more than accommodation makers.

2. When Rhinehart defaulted upon his contract, and the sureties undertook the completion of the contract, they (the sureties), if not copartners for this purpose, were at least engaged in a joint enterprise. Thereupon they executed the note to the firm of which Lamberson was a member. The situation, therefore, was analogous to that in which one of two copartnerships having a common member has a claim against the other.

In such case an action at law will not lie by one copartnership against the other, as no man may sue himself; but a suit in equity may be maintained, in which the rights and liabilities of all the parties to the transaction can be determined. Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526. If the sureties should not be considered copartners, we still have a case in which, if the allegations of the

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answer are true, the defendants have a complete defense against the action as to one of the members of the plaintiff firm, but not as to all; for, a good consideration having been given, the Gill estate is entitled to recover as its interest may appear. It seems hardly possible that under such conditions plaintiffs, including Lamberson, could maintain an action at law. 30 Cyc. p. 556, subd. c. But under our procedure this does not necessarily entitle defendants to judgment, as, if the allegations of the complaint or the pleadings as a whole show plaintiffs may be entitled to equitable relief, it should be granted. Crosby v. Timolat, supra.

It is not necessary at this time to consider the effect of section 4283, R. L. 1905, permitting the discharge of a joint debtor. This is also complicated by Lamberson's position as both debtor and creditor, and we think it better not to rule directly upon the question without fuller argument upon it.

In addition to alleging the agreement upon the part of Lamberson to hold defendants harmless, the answer alleged the possession by him of sufficient property to pay the balance of the note in full. If the allegations of the answer are true, defendants could have brought an action against Lamberson individually and made the firm a party, in which an accounting might be demanded from Lamberson, and the application of any funds found in his hands to the payment of the note in suit; for all of the partners are deemed to have possessed all the knowledge which Lamberson had. Hubbard v. Galusha, 23 Wis. 398. We have, therefore, a case in which all of the parties are before the court, in which adequate relief cannot be had at law, and one which is peculiarly the subject of equitable jurisdiction. Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940. The instruction given to the jury was erroneous, because it was impossible to adjust the rights of the parties in an ordinary action at law. By doing so the rights of the plaintiffs other than Lamberson were ignored, and the instruction was erroneous as to them.

3. It is argued that a counterclaim or set-off against one member of a firm cannot be interposed in an action by the firm for debt due to it. We think this is true. Peck v. Snow, Church & Co., 47 Minn.

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398, 50 N. W. 470; 30 Cyc. p. 502, subd. b. This, however, only further emphasizes the fact that the respective rights of the parties to this action can only be fully protected in an equitable action. The answer does more than plead a set-off. As to Lamberson it sets up an affirmative defense. It may be argued that, even conceding the truth of defendants' claims, they did not show grounds for equitable relief, as there was no claim that Lamberson was insolvent. Barker v. Walbridge, 14 Minn. 351 (469); Birdsall v. Fischer, 17 Minn. 76 (100). The rule stated in those cases does not seem applicable, when all the parties are before the court, certainly not when plaintiff's remedy is in equity. Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865; Becker v. Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. 543.

4. In view of another trial of the action, it is also proper that we should consider plaintiff's contention that the agreement claimed to have been made between Lamberson and the defendants was void under the statute of frauds. We cannot so hold. If made, it was an original promise upon the part of Lamberson for a sufficient consideration to save the defendants harmless, and while, in an action upon the bond, the defendants could not have varied their liability by parol testimony, their agreement with Lamberson, if made, may be enforced against him. Yale v. Edgerton, 14 Minn. 144 (194); Maurin v. Fogelberg, 37 Minn. 23, 32 N. W. 858, 5 Am. St. 814; King v. Franklin Lumber Co., 80 Minn. 274, 83 N. W. 170; Bennett v. Thuet, 98 Minn. 497, 108 N. W. 1; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 482.

The order is reversed, and a new trial ordered, without prejudice to the right of either party to apply for leave to amend their respective pleadings, with a view to a trial and submission of the action in accordance with the views expressed in this opinion.

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HAROLD JOHNSON and Another v. JOHN FEHSEFELDT.[1]

December 23, 1910.

Nos. 16,903—(195).

Thresher's lien — reply — departure.

Action for the purpose of enforcing a thresher's lien on a specific number of bushels of grain at a certain price per bushel. The answer alleged in defense that respondents were not entitled to recover for the reason that they had violated a contract to thresh appellant's entire crop. In denial of the existence of such a contract, the reply alleged that respondents stopped threshing for the reason that appellant had violated his contract to pay a stipulated price in case the price per bushel did not amount to a stipulated sum per day. *Held*, that the reply was in the nature of a plea in confession and avoidance, did not contradict the complaint, but supported and justified it, and was not a departure in pleading.

Action in the district court for Grant county to recover possession of certain crops or $250, their value, and for $100 damages. The substance of the pleadings is stated in the opinion. The reply was a general denial. The case was tried before Flaherty, J., and a jury which returned a verdict in favor of plaintiffs for $68.34. From an order denying defendant's motion to set aside the verdict or for a new trial, he appealed. Affirmed.

James B. Ormond, for appellant.

F. W. Murphy and *F. C. Anderson,* for respondents.

Lewis, J.

This action was brought to recover possession of four hundred thirty-three bushels of wheat, four hundred seventy-two bushels of oats, and five hundred thirty-one bushels of flax, alleged to have been in appellant's possession in his granary on his farm, upon which respondents had filed a lien for the threshing bill, amounting to $133.27, at the agreed price of ten cents per bushel for the wheat, six cents per bushel for oats, and fifteen cents per bushel for the flax.

[1] Reported in 129 N. W. 146.

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In defense, the answer set up a contract that appellant agreed to pay the amounts per bushel above stated, in consideration of respondents' agreement to thresh all of appellant's grain, or crop, in the fall of 1906, and to furnish, free of charge, all the necessary teams, help, labor, and machines, and the necessary feed and supplies; that, in violation of the contract, respondents stopped threshing operations before completing the contract, hauled their machine away, and refused to finish the threshing.

Respondents replied by alleging that, a few days before the performance of the threshing stated in the complaint, the parties made and entered into an agreement as follows: Appellant represented that the straw of his crop was free from weeds; that it was nice and straight and had been harvested in due season; that the grain would yield as good crop as any respondents had so far been threshing; and that in consideration of such representations respondents agreed to thresh appellant's entire crop, provided they were able to earn, by the use of their machinery and crew, the gross sum of $110 per day, or $30 per day net, and, if respondents were unable to make that amount, then they were to complete the job at the rate above specified per bushel. Respondents threshed the amount of grain above stated, and discovered that the grain was not as represented, and that their operating expenses were $80 per day, and that they were unable to earn more than $60 per day, and so notified appellant of their inability to complete the contract at the above rates per bushel. Respondents stated they were ready and willing to proceed and complete the threshing at the rate above specified per day, and so notified appellant, but that he refused to pay that amount, and refused to carry out the contract, and ordered respondents to immediately remove their outfit and machinery from the premises.

The question is: Were the facts set up in the reply a departure from the cause of action stated in the complaint, and should respondents have been prohibited from introducing any evidence in support of the allegations in the reply? Our view of the answer is that it is in the nature of a plea in confession and avoidance. It admits that the number of bushels were threshed as stated in the complaint, but alleges that respondents were not entitled to recover anything

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for such services, because they violated their agreement to thresh the entire crop. The reply denies that such a contract was made, by pleading another contract. If the facts stated in the reply were true, then respondents were entitled to recover, as alleged in the complaint. This reply supports and justifies the complaint, and does not contradict it.

Where the reply consists of new matter to meet defensive allegations of the answer, it cannot be construed as a departure from the complaint, unless the facts stated in the complaint are contradicted, and a new basis for relief is substituted for the complaint. To constitute a departure in pleading, the party must depart from the case already covered, and have recourse to another. Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Rosby v. St. Paul, M. & M. Ry. Co., 37 Minn. 171, 33 N. W. 698; Estes v. Farnham, 11 Minn. 312 (423); Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Johnson v. Hillstrom, 37 Minn. 122, 33 N. W. 547.

Affirmed.

CLARA CHRISTIANSON and Another v. MILLE LACS LAND & LOAN COMPANY.[1]

December 23, 1910.

Nos. 16,910—(154).

Purchase by broker of vendor.

Where an agent for the sale of real property, charged as a matter of law with the usual obligations incident to that relation, informs his principal that he has secured a purchaser of the property, and procures from the principal an executory contract for the sale thereof, in which the name of the purchaser is not given, and he subsequently inserts in the contract his own name as

[1]Reported in 129 N. W. 150.

[Note] Effect of broker's purchase of property listed with him on right to commission, see note in 45 L.R.A. 40.

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purchaser, the relation of principal and agent, if the principal ratifies the contract, ceases, and that of vendor and purchaser takes its place.

Same — right to commission forfeited.

By so becoming the purchaser the agent forfeits his right to a commission for effecting a sale, and he is not, in the absence of a special agreement after the change of the relation, entitled to compensation.

Findings sustained by evidence.

Findings of fact *held* sustained by the evidence.

Action in the district court for Benton county to have defendant decreed to be the trustee of plaintiffs in holding title to certain real estate, subject to actual moneys paid in the discharge of actual subsisting and valid judgments against plaintiff Clara Christianson; to quiet defendant's record title and that Clara Christianson be decreed to be the owner thereof; that an accounting be had and that plaintiffs, or one of them, recover from defendant the amount so ascertained to be due from defendant. The facts are stated in the opinion. The reply was a general denial. The case was tried before Taylor, J., who made findings of fact and as conclusion of law found that defendant was trustee of the legal title to the land, for the benefit of plaintiff Clara Christianson, and subject to the terms and conditions of the land agreement mentioned in the opinion, and in the event of nonperformance by the vendee of the terms and conditions of the agreement, plaintiff was entitled to a reconveyance of the legal title and that the action should be dismissed as to defendant Sperry. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

J. D. Sullivan, for appellant.

Stewart & Brower, for respondents.

Brown, J.

The facts in this case are as follows:

Plaintiffs are husband and wife. Defendant land and loan company is a corporation under the laws of this state, doing a general real estate and loan business at Milaca. The other defendants are not here involved, and we shall hereinafter refer to the corporation as defendant, or the company. Plaintiff Mrs. Christianson owned a

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tract of land situated in Benton county, which she and her husband listed with defendant company for sale at the price of $3,600. They subsequently offered to take $3,200 net to them, on certain conditions, which, not having been complied with, are not important. Defendant subsequently reported a sale for the sum of $3,400, but did not disclose the purchaser's name. In November, 1906, a contract for a deed, specifying the terms and conditions of the sale, was prepared by defendant and presented to plaintiffs for signature. They signed and executed the same in duplicate, but the writing did not give or state the name of the purchaser; the blank in the printed form not being filled in with such name. Subsequent to the execution of the contract by plaintiffs, defendant inserted its own name therein as purchaser, without the knowledge of plaintiffs. They were later informed of the fact, and by acceptance of certain payments ratified the same.

Thereafter defendant sold the land to defendant Kirk for the sum of $3,600, and executed and delivered to him a contract for the conveyance thereof upon payment of the purchase price. The contract of sale to defendant company provided for a down payment of $1,200, and the sale was subject to certain incumbrances then of record against the land. The balance of the purchase price, after deducting incumbrances, was payable at stated times in the future. Defendant company received a down payment of $1,500 on its sale to Kirk. Thereafter, on December 29, 1906, the company paid to plaintiffs the sum of $662 in full of the down payment of $1,200 called for by its contract. This amount was arrived at by deducting certain claims against the land, aggregating $538.

A controversy arose between the parties concerning the deductions, at the conclusion of which defendant gave to plaintiffs its check for the amount stated, which they cashed, and upon which they received the money.

It is the contention of defendant that the controversy upon this subject took the form of an accounting and settlement, and that the amount of $662 was paid to and received by plaintiffs in full discharge of the first payment. This was controverted on the trial, and the court below found against defendant's contention.

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Subsequent to this payment, possession of the land was delivered, and plaintiffs moved to North Dakota. Thereafter, in April, 1907, one Ewart brought suit against plaintiffs in the district court of Benton county, and recovered therein a judgment against them for the sum of $74.20. The summons was served personally, but no appearance was made by either of the defendants therein. An execution was thereafter issued upon the judgment, pursuant to which all the right, title, and interest of plaintiffs in and to the land in question was levied upon and subsequently sold in the due course of procedure to satisfy the same. One L. G. Sperry was the purchaser at the sale, and the sheriff issued and delivered to him a certificate of sale in due form on the nineteenth day of October, 1907.

The trial court found that Sperry was acting for and in the interests of defendant company, and that in fact the purchase at the sheriff's sale was made by it in Sperry's name. Subsequent to the expiration of redemption, no redemption having been made, Sperry conveyed the land to the company. During the year of redemption under this sale the company paid to plaintiffs the first deferred instalment of the purchase price of the property. After the expiration of redemption, and subsequent to the conveyance by Sperry, the company notified plaintiffs that their interest in the property had terminated by the execution sale, that defendant had purchased the title acquired thereunder, and was no longer indebted to them under the sale contract.

Plaintiffs then brought this action for a reinstatement of the sale contract, demanding that defendant be decreed to hold whatever title it acquired through the Ewart judgment and execution sale as trustee of plaintiffs, and for an accounting and settlement in respect to the amount due plaintiffs under the sale contract. The trial court found the facts substantially as stated, but in greater detail, and as conclusions of law that defendant held the legal title of the property in trust for plaintiffs, that it acquired no title adverse to plaintiffs through the Ewart judgment, and that plaintiffs were entitled to recover the sum of $705, due and unpaid upon the purchase price of the property. The company appealed from an order denying a new trial.

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It was conceded by counsel for the defendant on the oral argument that the conclusion of the trial court to the effect that the title acquired by defendant through the Ewart execution sale, by reason of the relations existing between the parties, inured to the benefit of plaintiffs, was correct, and the cause was submitted upon two contentions, namely: (1) That the court below erred in not holding that the settlement between the parties respecting the amount due on the down payment was final and conclusive; and (2) that the court also erred in not allowing defendant a commission for services in selling the land.

1. Both these questions must be resolved against defendant. The first presents a question of fact, and our examination of the record discloses ample evidence to sustain the findings of the trial court thereon. The contract of sale to defendant called for a cash payment of $1,200. When the time for its payment arrived, defendant insisted upon certain deductions on account of claims against the land, and plaintiffs protested against the same. We need not refer to the items. The court found some of them not properly chargeable against plaintiffs, and we affirm that conclusion. But defendant insists that a controversy existed between the parties in respect to the matter, and was compromised and settled, with the result that $662 was paid and accepted in full discharge of the first payment of $1,200. The evidence is not conclusive in support of this contention, nor so clearly and palpably against the findings of the court as to justify a reversal.

2. The relation of principal and agent existed between the parties, at least up to the time the contract of sale was made and entered into. If that relation was not then terminated, it is probable that defendant is entitled to compensation for its services. Plaintiffs had listed the land with defendant for sale, and authorized it to procure a purchaser thereof. Subsequently defendant itself became the purchaser, and entered into an enforceable executory contract for the purchase of the property, by the terms of which defendant undertook and agreed to pay plaintiffs for the land the sum of $3,400. Defendant's right to a commission was clearly merged in this express contract, by which the relation of the parties was entirely changed; and the trial court

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properly held that, in the absence of a special agreement for compensation, defendant thereby forfeited whatever right it had to insist upon compensation for effecting a sale. Kingsley v. Wheeler, 95 Minn. 360, 104 N. W. 543; Smitz v. Leopold, 51 Minn. 455, 53 N. W. 719; Dobson v. Racey, 8 N. Y. 216; Stewart v. Mather, 32 Wis. 344; Hammond v. Bookwalter, 12 Ind. App. 177, 39 N. E. 872. At the time of the execution of the sale contract the name of the vendee was not stated, and defendant subsequently inserted its own name therein as the purchaser. Plaintiffs did not know that defendant was the purchaser, and the evidence did not require of the trial court a finding that after they learned that defendant was buying the land, with knowledge of the fact, they agreed to pay a commission for its services. The completion of the transaction after notice would not necessarily obligate the vendor in such a case to pay a commission to the purchaser. Nor was the court, on the evidence, required to find that defendant continued throughout as the selling agent of plaintiffs, and that the transaction took this form for convenience. The evidence tending to establish that fact not only contradicted the written contract of sale, but the claim that such was the intention and purpose is wholly inconsistent with the unquestioned fact that defendant attempted to acquire through the Ewart execution sale a title to the property adverse to plaintiffs, who, if defendant's contention in this particular be sound, had the right to rely upon defendant, as their agent, to protect their rights. The trial court correctly disposed of the question.

The case is wholly unlike Sherwood v. Lovett, supra, page 83, 129 N. W. 141. In that case the parties did not bear to each other the relations of principal and agent.

Order affirmed.

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BERTHA GRIFFITH v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 30, 1910.

Nos. 16,802—(157).

Conflict of evidence — verdict sustained by evidence.
Evidence *held* sufficient to sustain findings.

Action in the district court for Otter Tail county by the administratrix of the estate of William L. Griffith, deceased, to recover $5,000 for the death of her intestate. The answer alleged that deceased was injured through his own negligence. The reply was a general denial. The case was tried before Baxter, J., and a jury which returned a verdict in favor of plaintiff for $2,500. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

J. D. Sullivan, for appellant.

Donohue & Stephens and *M. J. Daly,* for respondent.

O'Brien, J.

At the time of the accident, resulting in the death of William L. Griffith, he was a brakeman upon a mixed train of defendant, known as the "Pelican Rapids train." This train was to leave Fergus Falls immediately after the departure of the train known as the "Flyer," which was to arrive from the East. While awaiting the Flyer the mixed train stood heading east upon the passing track, which was north of the main track, over which the Flyer was to pass. There was a water tank at the side of the main track to the east of the station building. Between the water tank and station building a public street extended north and south. To leave this street open, the engine had been separated from the mixed train; the cars standing west and the engine east of the crossing. When the Flyer arrived from the

[1]Reported in 129 N. W. 152.

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East, it was stopped for water at the tank; the result being to bring the two engines practically abreast. About this time the engineer of the Pelican Rapids train started his engine backwards to couple it to the train, and Griffith, while standing between the rails of the passing track and engaged in making some adjustment of the coupling apparatus, or adjusting something else upon the end of the car, was caught between the couplers and received mortal injuries.

There was no claim that the engine moved at an excessive rate of speed, and practically all, if not all, of the witnesses agreed that the bell was being rung during its movement. It was Griffith's duty to give the signal for the moving back of the engine to make the coupling, and the dispute in this case is whether or not he gave such signal, or whether, while he was engaged in adjusting some appliance upon the end of the car, the engine was unexpectedly and without his knowledge moved down upon him. The case was submitted to the jury upon instructions which left to them generally the questions of negligence upon the part of defendant and contributory negligence upon the part of Griffith. The jury found for the plaintiff, and that Griffith's death was the result of negligence upon the part of the engineer. Defendant moved for judgment notwithstanding the verdict, which was denied, judgment entered, and defendant appeals.

1. Counsel for defendant contends that the evidence conclusively shows that, before the engineer started the engine, Griffith, who was then standing between the main and passing tracks, gave the signal to back; that the signal was obeyed in a careful and prudent manner, so that there was no negligence shown upon the part of the defendant. As already said, the only negligence which could be claimed under the testimony is the premature movement of the engine. Our inquiry, therefore, must be directed to one question only; i. e., was there evidence sufficient to justify the jury in finding as a fact that the engine was prematurely moved back upon the train? If there was such premature movement, we have no difficulty as to plaintiff's contributory negligence; for not only might he have been absorbed in the duties he was performing, but the noise made by the engine upon the main track might well have been sufficient to have excused him from hearing the approach of the engine which caused his death.

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The engineer of the Pelican Rapids (or mixed) train testified to the location about as described, and the stopping of the Flyer at the water tank; that he then got the back-up signal from the brakeman, William L. Griffith, then standing at the southwest corner of the back box car across the crossing; that he gave the signal with a lighted lantern; that witness personally took the signal, directed the fireman to ring the bell, and moved backwards. "Q. The question is, as you took the signal, immediately afterwards, what, if anything, did you see Griffith do? A. After I started to back up, I see him step in between the tracks." On cross-examination: "Q. How long did you observe Mr. Griffith from the time he gave this signal? A. I should think I got back probably forty feet; thirty or forty feet. Q. You watched him until you got back thirty or forty feet? A. Yes, sir; about a car length; that is the last I saw of him."

The fireman upon the engine testified to ringing the bell in response to the engineer's order, but did not see Griffith, and testified he could not, because he was on the other side of the engine.

The engineer upon the Flyer testified to arriving at the water tank and getting down to oil his engine, and said that after oiling the left end of the engine he went around the head of the engine, and then saw Griffith standing about twenty feet ahead of his (the Flyer's) engine and between the main and passing tracks. "Q. What was he doing? A. Giving signal to back up. Q. Did you see the signal? A. Yes, sir; I saw the signal." Witness paid no more attention to Griffith, excepting saying, "Hello, Willie," and knew nothing of the accident until after his train started to move up to the station.

The fireman upon the Flyer testified to being upon the back of the tank of his engine when it reached the water tank, and that he saw Griffith while right at the crossing give the back-up signal and walk towards the car.

We have, therefore, three witnesses whose testimony was positive that the signal was given, and if defendant's contention is sound, that this is the only evidence upon that question, and is therefore conclusive, it must be conceded that no negligence was established. As against this we have, first, the presumption that the deceased was in

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the exercise of due care. Lewis v. Chicago, St. P., M. & O. Ry. Co., 111 Minn. 509, 127 N. W. 180. And the following:

Mrs. Bradehoft was at the time of the accident upon the depot platform or upon the sidewalk of the street between the station and water tank. She testified that the man who was struck (Griffith) was on the car pounding something, and that his back was toward the engine. She testified upon cross-examination that it was about five o'clock and broad daylight, and, further: "Q. Did you see that man go in there between those cars? A. No. Q. He was there before you got there? A. He was there before I got there. Q. Now, when you got there, was this Pelican Rapids engine standing still, or was it moving? A. No; it was standing still when we got there. Q. First, when you saw it, it was standing still? A. Yes, sir. Q. It had been uncoupled, and the end of the freight train, where this man was standing or working, as you say, was on one side of the crossing, and the engine and tender was down the track towards the tank across the crossing? A. Yes, sir. Q. Now, after you stood there awhile, you say that Pelican Rapids engine commenced to move—to back up? A. Yes, sir. Q. The bell was ringing? A. Yes, sir. Q. You heard that ringing? A. Yes, sir. Q. And it backed up across the crossing, to where this man was, and pinched him between the tender and the freight train? A. Yes, sir. Q. Now, there was not anything to prevent that man from seeing across the crossing to see that backing up, was there, if he had looked? A. No. Q. There wasn't any teams passing back and forth? A. No."

Miss Kort, upon behalf of the plaintiff, testified to practically the same effect: "And you were there before the engine started to back? A. Yes, sir. Q. During all that five minutes was Griffith with his back toward the Pelican engine? A. Yes, sir. Q. And fixing that car? A. Yes, sir."

Ole Linner, amongst other things, said: "A. And when we got as far as up to the sidewalk we met Mrs. Bradehoft, and we stopped there and talked with her for about five minutes or so, and then the Pelican Flyer come backing up. Q. The Pelican Flyer, or the Pelican engine? A. The Pelican engine. And Mr. Griffith, he was fixing there on the box car. I don't know if it was a hammer or

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a monkey wrench he had in his hands there, I could not say. He was fixing there, and was turning his back east to the engine; and there was no signal or anything given to the engine there that I could see.

"Mr. Sullivan: I move to have stricken out what was not done. State what was done. The Court: Yes; tell what was done."

On cross-examination: "Q. Now, just as soon as the Flyer came in and commenced to take water, or about that time, the Pelican Rapids engine and tender commenced to back over the crossing and couple up again; is that right? A. Yes, sir. Q. Did you see Griffith go in there? A. No; he was in there before we got there? Q. When you noticed him first, he was in there at the end of the freight car? A. Yes, sir. Q. Then you saw in a very short time afterwards the engine and tender commenced to back up, and kept backing up until it squeezed him together? A. Yes, sir. Q. That is the way it happened? A. Yes, sir. Q. The bell of the Pelican Rapids engine was ringing? A. Yes, sir; ringing on both of them. Q. You say there was no signals given—you don't know what happened before Griffith went in there? A. No. Q. You don't know what kind of signal he gave the engineer, or whether he gave any signal, before he went in there, or know anything about that? A. No, sir."

Amelia Bradehoft testified upon cross-examination as follows: "Q. Now, Griffith was in between the tracks when you first saw him, was he? A. Yes, sir. * * * Q. You did not see him go in there? A. No. Q. You don't know what he did before he went in there? A. No, sir. Q. You don't know whether he gave any signal to the engineer or not? A. No, sir. Q. The first you saw of him, he was in between the tracks doing something at the end of the box car? A. Yes, sir. Q. Then the Pelican Rapids engine commenced to back up? A. Yes, sir. Q. The bell was ringing? A. Yes, sir; on both engines."

This witness and one of the other witnesses also testified that the engineer was not looking in the direction in which his engine was moving.

The engineer testified upon cross-examination: "A. There was a hammer laying beside the car. Whether he had it, or somebody

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else, or how it come there, I don't know, but it was laying alongside of the car."

We have quoted thus fully from the testimony in the case because counsel for defendant argues with much force and earnestness that the testimony of these witnesses called by the plaintiff does not contradict the positive testimony of the trainmen that Griffith gave the signal to back up; that the witnesses for the plaintiff did not arrive at their point of observation until after Griffith had given the signal and gone upon the track.

But we do not think this claim can be sustained. The engineer upon the Pelican Rapids engine claimed that Griffith was outside of the tracks when he gave the signal, and that after he started the engine back he saw Griffith step in between the tracks, and that he continued to see Griffith while his engine was moving some thirty feet. The witnesses for the plaintiff testified that Griffith was at the car hammering upon it with some implement before the engine commenced to back. It seems to us that there is a direct conflict in the evidence, and that the testimony of the witnesses for the plaintiff, taken in connection with the presumption that Griffith was in the exercise of due care, the finding of the hammer by the car, showing some unusual work, and the noise incident to the arrival of the Flyer, made this fairly a case for the jury to say whether the accident happened by reason of the premature backing of the engine, and also as to Griffith's own negligence. A simple manner of testing the soundness of this conclusion would be to imagine the case to have been submitted upon the testimony offered by the plaintiff. In such event it seems to us that there would be no question that the jury would be justified in finding negligence upon the part of the engineer; and, if that is true, how can it be said that, because three witnesses gave a different version of the transaction, the defendant has, therefore, conclusively rebutted the inference which could be fairly drawn from the testimony of plaintiff's witnesses.

It is, beyond all doubt, a case in which reasonable men might draw

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different conclusions from the testimony presented, and was, therefore, properly submitted to the jury for determination.

Judgment affirmed.

L. A. BARNES v. GEORGE F. DAVIS and Others.[1]

December 30, 1910.

Nos. 16,804—(110).

Pledge of stock by person not the owner — enforcement of lien by pledgee.

In an action to enforce a lien on the shares of the capital stock of a corporation, it is *held* that the findings of fact are sustained by the evidence, that they sustain the conclusions of law, and that the trial court made no reversible errors as to the admission of evidence.

Action in the district court for St. Louis county by the trustee in bankruptcy of Hansen Smith and James P. Smith, copartners as the Merchants Bank, against George F. Davis, E. W. Forbes and the Parry Sound Copper Mining Company, Limited, to recover $181.48 upon a certain promissory note of defendant George F. Davis, and to enforce an alleged lien for the amount of said indebtedness upon forty thousand shares of the capital stock of defendant Parry Sound Copper Mining Company, Limited, represented by certificate No. 1,873. The separate answer of defendant Forbes alleged her ownership of the original certificate of fifty thousand shares; that the same was loaned to Davis to be used as collateral security for his indebtedness to the bank, which she alleged she understood to be a note of $450; that she permitted Davis to use the stock as collateral, solely as a matter of accommodation to him, but that it was known to the bank that the same was her property; that said stock was subject to a pool arrangement and this answering defendant was under obligation not to sell or offer the same for sale, all of which was known to the Smiths and to Davis; that thereafter

[1]Reported in 128 N. W. 1118.

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she caused ten thousand shares of said fifty thousand shares to be released from said pool arrangement, and consented to the sale of ten thousand shares at the rate of ten cents per share that the indebtedness of Davis to the bank might be paid out of such sale, and this arrangement was made with the express agreement that the forty thousand shares should be delivered to her free from any claim by the bank or the party holding the original fifty thousand shares; that the arrangement for release of the forty thousand shares and sale of the ten thousand shares was known and consented to by the bank and that, upon the sale of the ten thousand shares by the bank, a sum largely in excess of the amount for which the fifty thousand shares was held as collateral security was realized by the bank. There was specific denial of any authority on the part of Davis to pledge Smith the certificate of forty thousand shares as security for his note of $181.48. The reply was a general denial.

The case was tried before Ensign, J., who made findings of fact and as conclusion of law found that plaintiff had a lien upon the shares of stock represented by certificate No. 1,873 to the amount of $303.15. From the judgment entered pursuant to the findings, defendant E. W. Forbes appealed. Affirmed.

H. J. Grannis, for appellant.

H. H. Phelps, for respondent.

START, C. J.

Appeal by the defendant Forbes from the judgment of the district court of the county of St. Louis adjudging that the plaintiff recover of the defendant Davis $309.21, with costs, and that he has a lien on the shares of the capital stock of the defendant corporation described in the judgment to secure its payment. The cause was tried by the court without a jury. The here material facts found by the trial judge are, briefly stated, to the effect following:

Hansen and James P. Smith were partners doing business as the Merchants Bank, at Duluth. The plaintiff is the trustee in bankruptcy of their estate. In September, 1901, Davis applied to Forbes for a loan of certain shares of the capital stock of the corporation, then owned by her, to be used as collateral security for the payment

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of his then indebtedness to the Merchants Bank. Forbes complied with the request by delivering to Davis certificate No. 19 for fifty thousand shares of such stock, which was in Forbes' name, but was indorsed in blank on the back thereof in the usual way, so that it might be transferred to any purchaser by filling in his name above the signature of Forbes written thereon. Certificate No. 19 was so indorsed and delivered with the understanding that it was to be used by Davis as collateral security for his indebtedness to the bank or to Hansen Smith. Thereupon Davis turned certificate No. 19 over to Smith as collateral security for an overdraft which he then owed to the bank, amounting to $375, and a note held against him by Smith for $225. On November 7, 1901, such indebtedness was by the agreement of Smith and Davis reduced to the form of a promissory note, signed by Davis, for $600, payable to the bank. Certificate No. 19 was left with Smith and the bank as collateral security for the payment of the note. In September, 1902, the certificate, pursuant to the agreement of Davis and Smith, was sent to the office of the corporation, and three new certificates were issued in lieu of certificate No. 19—two for five thousand shares each, and the other, No. 1,873, issued in the name of Forbes, for forty thousand shares. The certificates representing in the aggregate ten thousand shares were sold for the sum of $850, pursuant to the agreement between the bank and Davis, which was applied by the bank first to the payment of an overdraft then due from Davis to it, and the balance upon the $600 note, leaving a balance due thereon of $181.48, for which sum Davis executed to Hansen Smith, for the bank, his promissory note payable with interest at the rate of ten per cent. per annum, and as collateral security for its payment left with Smith certificate No. 1,873. This note, with interest, constitutes the basis of the judgment herein against Davis. Subsequent to the receipt of the original certificate, No. 19, as collateral security, Smith and the bank were informed by Davis that before the transfer by Forbes it had been pooled (what is meant by that term does not appear from the findings), and prior to the sale of the ten thousand shares they were informed by Davis that he had arranged with Forbes to have such shares released from the pool; but at no time

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did Smith or the bank have any notice or knowledge that any one other than Davis had an interest in the original certificate No. 19, or in any of the certificates issued in place of it, and they believed that it was his property.

The trial court upon these facts found as a conclusion of law that the plaintiff had a lien on the shares of stock represented by certificate No. 1,873 to the amount of the judgment against Davis, and that they be sold to pay it. The defendant Forbes made a motion for amended findings of fact and a motion for a new trial, which were denied. The appellant assigns thirty-one alleged errors, but they present only the question whether the finding and decision of the trial court, to the effect that the plaintiff had a lien on the shares of stock to secure the payment of $181.48, were correct, and incidentally whether the court erred in its rulings as to the admission of evidence. Fifteen of the assignments of error relate to the rulings of the court on the admission of evidence. We find no reversible error in any of them.

Another group of alleged errors raise the question of the sufficiency of the evidence to support the findings of fact, which are separately specified in the assignments of error. We are of the opinion that the findings complained of are supported by the evidence, and that the evidence did not require, as a matter of law, the trial court to amend its findings of fact as requested.

The other assignments raise the question whether the facts found sustain the conclusion of law. It is the contention of the appellant that they do not, for the alleged reasons, with others, that the bank had no right as against the appellant to apply the proceeds from the sale of the ten thousand shares to any debt except the note, or, in other words, that the overdraft was not secured by them; that the new certificate for forty thousand shares was issued in her name, and was not indorsed by her, hence it is within the rule that a pledge of stocks by delivery without indorsement is subject to the equities of third persons; and, further, that as against the true owner it is incumbent on the pledgee that the advances claimed were made on the faith of the security, and that there is no such finding.

This last objection is a technical one; for, conceding that there is

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no direct finding to that effect, it is apparent from the undisputed evidence that credit was extended on the strength of the collateral, the stock.

The second objection would be potent if the original certificate had not been indorsed in blank according to the usual custom; but it was, and neither Smith nor the bank at any time had any notice or knowledge that any other person had any interest in the shares of stock. They dealt with Davis as the owner of the shares. It is true that one of the renewal certificates was in Forbes' name; but this must be considered in connection with the fact that she by her indorsement of the original certificate represented that Davis was the owner of all of the shares of stock, and that the bank thereafter dealt with him as such. All of the shares were pledged for his indebtedness when the original certificate was duly indorsed by Forbes and delivered to the bank. The renewal certificate was never delivered to Forbes.

The first objection is without merit, for by the agreement with Davis the proceeds of the sale of the ten thousand shares, the renewal certificates which were not in Forbes' name, were applied first to the payment of the overdraft, and the balance on the original indebtedness as represented by the note.

We are of the opinion that the conclusions of law are sustained by the facts found.

Judgment affirmed.

O'Brien, J. (dissenting).

I am unable to satisfy myself that defendant E. W. Forbes consented to the deposit as security for the payment of the overdraft above the $600 note, and therefore dissent.

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ADELBERT A. AMES v. HANNIBAL H. AMES.[1]

December 30, 1910.

Nos. 16,837—(187).

Change in partnership agreement — evidence.

A modification of contract of copartnership, as found by the trial court, was sustained by the evidence.

Allowance of interest.

In the absence of an express agreement, partners are not ordinarily entitled to interest as against each other.

Quære — money advanced by partner.

Whether a sum advanced by one partner to improve real estate owned by a copartner, but used in the firm business, is, in this case, to be repaid from the firm assets, or to be considered a personal debt, due from the owner of the real estate—quære.

Action in the district court for McLeod county for an accounting of certain copartnership dealings from the commencement of the copartnership, and all the moneys received and paid by plaintiff and defendant, respectively, in relation thereto; that the property, if any remain, be sold and the debts, if any, be paid, and if there be any surplus that it be divided between the parties according to their respective interests. The facts are stated in the opinion. The letter of defendant dated Minneapolis, October 12, 1894, mentioned in the opinion, was attached to the agreement and also attached was the answer of plaintiff, dated Northfield, October 13, 1894, containing these words: "Yours of yesterday setting forth your understanding of our agreement has been received. I will accept your interpretation. When I send you the contract for signature I will have attached this letter of yours and the sketch of the agreement I wrote and which you assented to, as modified by your letter. The contract will be interpreted by the aid of said sketch and modifying letter." The amended answer alleged that the provision found in the fourth

[1]Reported in 129 N. W. 156.

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paragraph of the opinion was omitted by mutual mistake, prayed that the agreement be reformed so as to express the true intent of the parties, and for the dismissal of defendant. The reply was a general denial.

The case was tried before Morrison, J., who made findings of fact and as conclusions of law found that defendant was entitled to judgment reforming the contract so that the same should express the true intent and meaning of the parties; that there was due defendant out of the funds of the copartnership the sum of $42.24, and that he was entitled to judgment for that amount; that the partnership be dissolved. From the judgment entered pursuant to the findings, plaintiff appealed. Reversed and new trial ordered.

James I. Best and *Flannery & Cooke,* for appellant.

W. C. Odell and *Sam G. Anderson, Jr.,* for respondent.

O'Brien, J.

Plaintiff, a resident of Massachusetts, owned a flour mill at Northfield, in this state, and on October 15, 1894, entered into a written contract with his cousin, the defendant, which provided that defendant should take possession of the mill, and repair and modernize it, by the expenditure of about $3,000, furnish a miller, who would have charge of the mill, and give as much of his own time as should be necessary to supervise the running of the mill and the business connected therewith. Profits and losses to be divided and borne equally. Either party had the right to cancel the contract by giving written notice of not exceeding three months. Then followed these provisions: "At the termination of this contract from any cause, it is agreed and understood that said mill and all said real estate and the machinery in said mill shall not form any part of the assets to be divided by the parties hereto, but it shall be the property of said Adelbert Ames, or other lawful owner. That, after the payment of all just debts, all other property, whether stock on hand, accounts, bills receivable, or any other property of any nature, shall be equally divided between said parties hereto.

"It is understood that said mill and real estate may at any time be sold by its owners, and if said mill and the real estate be sold by the

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owners thereof, so that it cannot be used for the purposes of this contract, then in such case said party of the first part agrees to repay to said party of the second part such sums as he may have expended for labor in modernizing the mill, and also a fair valuation on the machinery put in the mill by said party of the second part."

After a verbal understanding between the parties, and before the contract was signed, some correspondence took place between them, which appears to have been attached to the contract, for the purpose either of modifying it or in explanation of its terms. A quotation from a letter written by defendant to plaintiff, dated October 12, 1894, will sufficiently indicate the understanding of the parties in this respect: "The way I understand it is this: That the necessary repairs on the mill to keep it in good running order, such as bolting cloth, belts, etc., shall be paid from the mill's earnings, which will come in the expense account. But, should the flume or dam or building need repairs, such as painting, a new roof, or anything of that kind, shall expect you to do it; also to pay the insurance on the real estate and taxes, the business to pay taxes and insurance on stock."

The copartnership continued until about December 4, 1899, when it was dissolved. The plaintiff brought this action for an accounting. Defendant in his answer claimed that through inadvertence and mutual mistake there had been omitted from the contract a clause: "* * * That at the time of the dissolution of said copartnership, by notice as in said contract provided or otherwise, that said plaintiff should repay said defendant such sums of money as said defendant had, prior to said dissolution, expended for labor in modernizing the mill, * * * and also a fair valuation for the machinery put in the mill by said defendant * * *"—and asked that the contract be reformed by the addition of a clause to that effect, and an accounting had upon the contract so reformed. The trial court found in favor of the defendant upon this issue, which finding is attacked as being unsupported by the evidence.

1. Aside from the evidence furnished by the situation of the parties and that afforded by the contract itself, much of the evidence relied upon by both parties consisted of correspondence between

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them. As is often the case, diametrically opposite conclusions are drawn from the language used by the parties in their letters to each other. But, taking the entire record, we are inclined to think that the evidence sustained the finding of the court upon this question, and the contract must be considered as containing the clause thus added. We come to this conclusion the more readily from a consideration of the situation of the parties at the time the contract was made.

Plaintiff was the owner of a mill, the value of which was estimated to be from $10,000 to $30,000. Apparently some expenditures were necessary to make the operation of the mill financially successful. Defendant appears to have been prepared to furnish the cash for this purpose, and thereupon the parties formed a copartnership to engage in the milling business, agreeing to share the profits and losses equally. To this copartnership plaintiff contributed the mill, agreeing to keep up the taxes and insurance upon it, and defendant contributed the cash required to modernize the mill, the wages of the miller, and some of his time in exercising general supervision.

If the matter were not confused by attempting to ascertain the exact literal meaning of the language used in the contract, it would be apparent that on the dissolution of the copartnership plaintiff would receive his mill intact, defendant would receive back the amount contributed by him to the copartnership, and any profits would be divided equally between the parties. But it is argued that, the contract containing provisions for the payment by plaintiff to defendant of the amount so advanced only in case of a sale of the mill, payment of such amount under any other circumstances must be excluded, and this in spite of the provision giving either party the right of cancellation. If this construction of the contract is true, plaintiff could, immediately after his mill had been at defendant's expense put in efficient and modern condition, have canceled the contract and retained the benefit of defendant's expenditures. We think such a construction of the contract would be so unconscionable that a court of equity should refuse to enforce it. As we look at this case, therefore, the rights

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of the parties are but little changed, if at all, by the modification of the contract as directed by the court.

2. During the continuance of the copartnership certain sums were advanced by each of the copartners; defendant advancing somewhat larger sums, and in addition, as found by the court, making advances for certain repairs to the buildings, which the plaintiff, as already said, undertook to maintain. In connection with some of these advances made by defendant, the plaintiff was charged with interest at the rate of ten per cent. per annum. Such items of interest were allowed by the trial court. In the absence of an express agreement, partners are not ordinarily entitled to interest against each other. We think the interest charges were not justified, and should not have been allowed. St. Paul Trust Co. v. Finch, 52 Minn. 342; Bates, Partnership, § 786.

3. Shortly after the dissolution of the copartnership defendant had on hand as partnership funds the sum of $8,780.21. Of this amount he turned over to plaintiff $2,324.13, claiming the right to retain the balance. The trial court found defendant to be entitled to $42.24 in addition. We have, therefore, to consider the correctness of the distribution so made by defendant, without regard to the propriety of the interest charges already referred to.

As found by the court, at the time of the dissolution defendant had drawn as profits a sum which amounted to $1,929.14 more than the amount received by plaintiff as profit. Plaintiff was therefore first entitled to that sum to equalize the accounts. This would leave $6,851.07 for distribution. The trial court apparently held that this amount should be equally divided, but that the amount expended by defendant to modernize the mill should be repaid to him out of plaintiff's share of the profits. So that, taking the sum of plaintiff's first credit, $1,929.14, and one-half of $6,851.07, to wit, $3,425.53, his share would amount to $5,354.67. As against this amount defendant was entitled to charge $3,072.78, the amount expended by him upon the mill, and $2,324.13, paid to plaintiff by defendant after the dissolution, or a total of $5,396.91, resulting in a balance in defendant's favor of $42.24. This result was arrived at by treating the amount expended by defendant in modernizing

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the mill as a debt due personally from plaintiff, and not as a partnership obligation. If the proper construction of the contract is that the sum so expended by defendant should be considered as his contribution to the capital, and repaid to him from the partnership assets before any net profit could be determined, the funds in his hands should have been distributed as follows: Total fund, $8,780.21, from which there should be first paid to plaintiff $1,929.14, and to defendant $3,072.78, leaving funds remaining for equal distribution, $3,778.29, one-half of which would be $1,889.14. This amount, added to plaintiff's first credit, would show him to be entitled out of the fund to the sum of $3,818.28, from which, if we deduct the amount paid him by defendant, to wit, $2,324.13, we find a balance still due plaintiff of $1,494.15.

We have some difficulty in determining whether or not defendant should be repaid from the partnership funds, or whether the amounts expended by him as described should be considered a personal obligation due him from the plaintiff. The result in one case is a repayment to defendant of the full amount contributed by him to the joint enterprise, while at the same time he retains an excessive amount of the net profits. Upon the other hand, if defendant's contributions are treated as a partnership liability, the plaintiff, being the owner of the improvements and mill, apparently obtains some undue advantage.

In this connection the provision in the contract with reference to the ownership of the mill upon dissolution of the copartnership becomes important. We have considerable doubt that these considerations were fully urged upon the trial court, and in view of that fact, and because in any event there must be a new trial of this action, in order that the interest charges improperly made may be eliminated, we refrain from announcing a final conclusion upon this branch of the case, feeling that it should only be decided after fuller arguments by both parties.

Judgment reversed, and new trial ordered.

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MARY JANE ROY v. HARRISON IRON MINING COMPANY.[1]

December 30, 1910.

Nos. 16,883—(202).

Construction of power of attorney — husband and wife — evidence.

The finding of the trial court that a power of attorney from "Peter Roy and Philomen Roy, Sen. (wife of Peter Roy)," appointing another "true and lawful attorney for me and in my name," and continuing throughout in the first person singular, was intended to authorize the sale of the husband's land only, and not the separate property of the wife, *held* to be sustained by the evidence.

Action in the district court for Itasca county to determine adverse claims to certain vacant and unoccupied land. The defendant iron mining company alone appeared. Its answer denied the allegations of the complaint and as a counterclaim alleged that plaintiff claimed some interest or ownership by reason of a conveyance in the year 1892 from her mother Philomen Roy, Sen., who with her husband in the year 1873 conveyed by good and sufficient deed to defendant's predecessors or grantors, and after the making and delivery of such deed Philomen Roy, Sen., and her husband never had any right, title or interest in the land; that such deed was recorded in the office of the register of deeds of Itasca county in the year 1873; that by virtue of that deed and by mesne conveyances the title to the land in fee simple absolute had been conveyed, and then was, in defendant company, which had been in quiet and peaceful possession of the same for more than six years prior to the bringing of the action, and that plaintiff's claim is a cloud on defendant's title to the same. The reply was a general denial. The facts are stated in the opinion. The case was tried before McClenahan, J., who made findings of fact and conclusions of law, as stated in the

[1]Reported in 129 N. W. 154.

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sixth paragraph of the opinion. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

J. A. Murphy, Thomas R. Benton, and *W. M. Steele,* for appellant.

J. T. Van Metre and *John H. Steele,* for respondent.

O'BRIEN, J.

Plaintiff brought this action to quiet title. October 25, 1873, Philomen Roy, Sr., who was then the wife of Peter Roy, applied to the United States to locate one hundred sixty acres of land in Stearns county. On January 10, 1874, a receipt for $200 in full payment was issued to her by the receiver at Duluth, showing her to be entitled to a patent for the land. A patent was subsequently issued to her, dated April 20, 1875, and which, according to a notation on the government records, was on June 5, 1878, mailed to H. F. Brown. On September 18, 1872, there was executed a power of attorney, a portion of which we quote:

"Know all men by these presents, that Peter Roy & Philomen Roy (wife of Peter Roy), of the county of Morrison, in the state of Minnesota, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. E. Brown, of Hennepin county, in the state of Minnesota, true and lawful attorney for me, and in my name, place, and stead, to enter into and upon and take possession of any and all pieces and parcels of land, or the timber and other materials thereon, in the state of California, and in any state or territory of the United States which I now own, or which I may hereafter acquire or become seised of, or in which I may now or hereafter be in any way interested; * * * and I further authorize and empower my said attorney to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, or the right to sever and remove timber and other materials therefrom, to such person or persons and for such prices as to my said attorney shall seem meet and proper, and thereupon to execute, acknowledge, and deliver in my name and on my behalf any deeds, leases, contracts, or other instruments, sealed or unsealed, and with or without covenants and warranty. * * *

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"In witness whereof, I have set my hand and seal this eighteenth day of September, A. D. 1872.

"Peter Roy, [Seal.]

her

"Philomen X Roy, Sen. [Seal.]"

mark

In the portions of the power omitted the personal pronoun in the first person singular was continued throughout. The power was acknowledged by both husband and wife; the acknowledgment reciting that the wife acknowledged the same on an examination "apart from and without the hearing of her husband."

By warranty deed, dated October 31, 1873, C. E. Brown, assuming to act as attorney in fact for Peter and Philomen Roy, conveyed the land to his brother, Henry F. Brown, and by mesne conveyances whatever title was so conveyed is now in defendant, the Harrison Iron Mining Company. On December 21, 1892, Philomen Roy, Sr., then a widow, executed a quitclaim deed for the land to her daughter, Mary Jane Roy. The deed was recorded December 27, 1892. No taxes were paid by Philomen Roy or the plaintiff.

The mining company answered, claiming title under the deed to it. Neither party claimed adverse possession. The trial court found the issuance of the patent and execution of the power and deeds as already recited, and in reference to the power of attorney: "* * * But said Philomen Roy, Sr., so executed said power of attorney for the sole purpose of thereby authorizing said Brown to release her dower interest in her said husband's lands, and no authority was thereby intended to be given to convey or dispose of her separate estate; that said power of attorney was duly recorded on November 10, 1873." As conclusions of law, plaintiff was found to be the owner in fee simple of the land, free from any interest by defendant, and judgment in plaintiff's favor was directed. Subsequently defendant moved for amended findings, so as to include the transactions relating to the application for the land made by Philomen Roy and kindred matters and findings as to the various conveyances which would entitle defendant to judgment. The motion was denied, judgment entered, and defendant appealed.

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While several errors have been assigned, we fully agree with the following frank statement with which counsel for appellant commence their argument before this court: "All of the foregoing assignments of error reach back and relate, either directly or indirectly, to the effect given by the trial court to the power of attorney." It is only necessary, therefore, to consider whether the evidence supports the finding of the trial court to the effect that the power was from Peter Roy for the conveyance of his separate lands, and not intended to authorize the sale of the separate property of the wife.

Philomen Roy, now more than seventy years of age, denied the execution of any power by her. However, the learned trial judge seemed to entertain no doubt that she had executed the power for some purpose. There was no finding, and perhaps no definite claim, of fraud. The evidence as to the situation of the parties at the time she took the necessary steps to obtain title was very slight, and evidently considered of no value, since the trial court refused to make any findings with reference to that subject. We have, therefore, to determine whether or not the instrument itself bears internal evidence that it was intended to operate only as found by the court.

A memorandum made by the learned trial judge reads as follows: "The contention that the plaintiff's grantor did not sign the power of attorney to Brown cannot be given very serious consideration; but, on the other hand, the arguments advanced in support of defendant's claim that Philomen Roy, by such power of attorney, authorized a conveyance of her separate estate, are not very impressive. The instrument itself, as I read it, leaves little to be said as to what was intended. It presents the ordinary case of a married woman joining with her husband in the execution of an instrument affecting his lands and her dower interest therein. The rules for construing powers of attorney are well settled, and, in my judgment, force the conclusion reached in this case. Gilbert v. How, 45 Minn. 121 [47 N. W. 643, 22 Am. St. 724]; Tuman v. Pillsbury, 60 Minn. 520 [63 N. W. 104]; Snell v. Weyerhauser, 71 Minn. 57 [73 N. W. 633]; Stoneware Co. v. McCrossen, 110 Wis. 316 [85 N. W. 1019, 84 Am. St. 927]. Under the pleadings no equitable relief is here sought. Stuart v. Lowry, 49 Minn. 91 [51

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N. W. 662]; Holland v. Netterberg [107 Minn. 380] 120 N. W. 527."

The authorities relied on by the trial court are controlling. Tuman v. Pillsbury is directly in point, holding, as it does, that the intention of the grantors in the power is the ultimate question to be determined. In that case a joint power was held to authorize the sale of the husband's separate property. Naturally such a finding would be still more easily arrived at where the power upon its face authorized the sale of only the property of one of the parties, without, however, specifying which. It is doubtful that the same conclusion could be reached under the authority of Gilbert v. How, supra, in which it was held a joint power was not sufficient for the conveyance of the separate property of one. Those cases can be distinguished. In the Tuman case the parties were husband and wife, the power referred to lands acquired in a special manner, and the husband acquired the land in the specified manner. In Gilbert v. How these facts did not appear.

Counsel have cited other authorities, amongst them Weare v. Williams, 85 Iowa, 253, 52 N. W. 328; 1 Parsons, Contracts (6th Ed.) p. 11; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433; Platt v. Finck, 60 App. Div. 312, 70 N. Y. Supp. 77; Bishop, Contracts, § 383; Moss v. Wilson, 40 Cal. 151; Knisely v. Shenberger, 7 Watts (Pa.) 193; Dill v. White, 52 Wis. 456, 9 N. W. 404; Monson v. Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Scheid v. Leibshultz, 51 Ind. 38. But we think the decisions of this court are conclusive, and to the effect that under a power such as this purchasers take a conveyance at their own peril, and if the language of the power is ambiguous, and the conveyance is not one which the grantors intended to authorize, no title passes. Snell v. Weyerhauser, 71 Minn. 57, 73 N. W. 633.

Defendant's claim, as we understand, is that the evidence shows that about the time of the execution of this power Philomen Roy made her application to the land office for the land, shortly afterwards received her final receipt, and thereafter gave no attention to the matter; all showing, if the power is open to construction, that it was intended to authorize a conveyance of her separate property.

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Against this is the first statement in the power authorizing the conveyance of lands in California or any other state and the form of acknowledgment, reciting her separate examination.

I am personally unable to satisfy myself that the intention found by the trial court can be determined from an examination of the instrument itself, and think upon a question of so much doubt the surrounding circumstances should be given greater weight than they were in this case, and that the trial court should have found something more with reference to those circumstances. Further than this, I can see nothing in the instrument itself which indicates that it was intended to authorize the conveyance of the husband's land, any more than that of the wife, or land held jointly by both. It would, to my mind, be much more logical to reject the instrument entirely, as indefinite and ambiguous, than to interpret it as being intended to cover the husband's lands only. But a majority of the court hold otherwise, and to the effect that the finding of the learned trial judge in this respect was fully sustained by the evidence.

Under the pleadings in this case, both parties relying solely upon the legal title claimed respectively by each, defendant was not entitled to equitable relief. Holland v. Netterberg, 107 Minn. 380, 120 N. W. 527.

Judgment affirmed.

GEORGE A. McKINLEY and Others v. CHARLES J. MACBETH.[1]

January 6, 1911.

Nos. 16,626—(16).

Value of property — examination of witnesses thereon.

The extent to which witnesses may be examined or cross-examined upon the subject of the value of property having no fixed market price rests in the discretion of the trial court.

[1]Reported in 129 N. W. 216, 389.

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Parol evidence of judgment excluded.

Parol evidence of the existence of a judgment of record in the court in which the action was on trial *held* properly excluded.

Modification of written contract by parol.

The rule that a contract for the sale or exchange of real property, required by statutes to be in writing, cannot be modified by subsequent parol agreement, has no application to a written contract so modified, which subsequently has been fully performed.

Verdict sustained by evidence.

Evidence *held* to sustain the verdict, and that the record presents no reversible error, either in the rulings of the court in the admission or exclusion of evidence or in its charge to the jury.

Action in the district court for Blue Earth county to recover $10,000 for breach of a written contract for the exchange of certain lands for improved property belonging to defendant. The complaint alleged that defendant, for the purpose of defrauding plaintiffs, conveyed his property to innocent purchasers and refused to convey his property to plaintiffs, or to cause it to be conveyed. The answer alleged that the written contract by mutual consent was annulled, and the parties entered into a verbal agreement by which defendant should convey his property to one Samson. The reply was a general denial. The facts are stated in the opinion. The case was tried before Pfau, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiffs' motion for a new trial, they appealed. Affirmed.

H. L. & J. W. Schmitt, for appellants.

W. R. Geddes and *S. B. Wilson,* for respondent.

BROWN, J.

Action to recover damages for the alleged breach of a contract for the exchange of certain lands and real property. Defendant had a verdict, and plaintiffs appealed from an order denying a new trial.

The facts are as follows: Plaintiffs, George A. and Alice L. McKinley, had, prior to the transaction here involved, entered into an executory contract for the purchase by them of certain lands, a part of which were in the state of North Dakota, and a part in this

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state. The land was incumbered to the extent of $8,600. On or about November 16, 1905, their said contract being then in force, and a valid and binding obligation upon their part and upon the part of the vendor therein, the McKinleys entered into a contract with defendant by the terms of which plaintiffs agreed to assign the contract to defendant in consideration of defendant's agreement to deed and convey to plaintiffs certain improved real property owned by him in the city of Mankato, this state. The contract was in writing, and provided that the assignment of plaintiffs' contract should be subject to incumbrances against the land aggregating $8,600, and that the conveyance of defendant's property should be subject to incumbrances to the amount of $7,000. Defendant thereafter made certain objections to the contract, based upon what he considered misrepresentations concerning the Dakota land. It is not necessary to refer to this matter in detail. The misunderstandings were adjusted, and plaintiffs formally assigned their purchase contract to defendant, and he accepted and received the same.

It is the contention of plaintiffs, and herein is the foundation of their action, that defendant never at any time conveyed his Mankato property to plaintiffs, and has at all times failed and neglected to do so. Therefore they demand damages for his breach of the contract. Defendant denied any breach of the contract on his part.

The facts bearing upon the question whether defendant failed to perform are as follows: At the time of the transaction defendant was indebted to the First National Bank of Mankato in the sum of about $7,000, a part of which was secured by mortgage upon the property defendant proposed to exchange with plaintiff. As we understand the situation, it was proposed to consolidate all prior mortgages in a new one to be executed by defendant to the bank for the total indebtedness of $7,000. The officers of the bank were informed of the contract of exchange, but refused to rearrange its mortgages, unless some responsible person would assume and agree to pay the mortgage debt.

Defendant presented the matter, together with his other objections to the original contract, to plaintiffs, and to facilitate a completion of the transaction it was then orally agreed, so defendant

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claims, that the original contract of exchange should be modified in certain respects not here material, and also to the effect and as requiring defendant to convey his property to one Samson, instead of the plaintiffs. Defendant also claims that it was further then mutually agreed between plaintiffs and defendant that plaintiffs should procure from Samson an agreement on his part to assume and agree to pay the indebtedness upon the property so to be conveyed by defendant, and, further, that it was then agreed that the deed from defendant should so provide, and be executed and delivered to the bank, to be by it delivered to Samson.

There is no question but that the plaintiffs requested that the deed be made to Samson; the purpose being to consummate another real estate bargain then existing between those parties. Samson, however, had no contractual connection with the case at bar. Defendant contends that, pursuant to this modified contract, plaintiffs assigned their purchase contract to defendant, and defendant in turn executed in due form a conveyance of his Mankato property to Samson, and delivered the same to the bank, as required by the terms of the new agreement. The deed contained a clause by which Samson assumed and agreed to pay the incumbrance of $7,000. Samson refused to accept the deed, because of this assumption clause, and also because of some objectionable details in respect to partial payments upon the debt. The transaction was finally completed in this manner about December 6, 1905.

The substantial controversy in the court below ranged about the question whether by the modified agreement plaintiffs undertook and agreed to procure Samson to assume the indebtedness against defendant's property. The trial court charged the jury that if such was the agreement between the parties, and defendant's deed to Samson was executed and delivered to the bank in conformity therewith, defendant was not in default, had not failed or refused to comply with the contract, and plaintiffs could not recover. There was no error in this disposition of the case.

Plaintiffs' motion for a new trial was based upon the usual grounds of errors in law, and that the verdict is not justified by the evidence, and also newly-discovered evidence. These grounds are specified

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in the assignments of error in this court, and we will consider them in the order discussed in the briefs.

1. During the cross-examination of plaintiff George A. McKinley, counsel for defendant drew out, over the objection of plaintiffs, the fact that at the time of the transaction in question plaintiffs were in default in one of the payments under the purchase contract; that is, that they were behind in one payment. In its charge the court referred to this in reciting the case to the jury, and stated "that for the purpose of saving this land and saving something from them, he sought to make a trade or deal, and that he applied to the defendant in this case for the purpose of making a deal with him." We discover in this no error of a nature to justify a reversal. Of course, it was wholly immaterial whether plaintiffs were behind in their payments. But it was undoubtedly true that they sought by the exchange with defendant to make a profit, the natural and reasonable purpose of all real estate dealers. Clearly no prejudice resulted from this evidence, nor from the remarks of the court. The issues were thereby neither clouded nor the jury misled. Farnham v. Thompson, 32 Minn. 22, 18 N. W. 833.

2. The exchange contract called for a deed from defendant free and clear of all incumbrances, save a mortgage for $7,000. On cross-examination of defendant, counsel asked the question: "Now, at the time this contract was entered into between you and Mr. McKinley, there was a judgment outstanding and docketed against you in this county in favor of the Standard Lumber Company, wasn't there?" An objection to the question was sustained, as incompetent, irrelevant, and immaterial. There was no error in the ruling. The judgment record was the best evidence. There was no effort to produce it, and the question ruled out was not followed by an offer to show the existence of such a judgment. And, moreover, the refusal of Samson to accept the deed from defendant was based upon the assumption clause therein, and not for defects in the title, or because of liens upon the land other than those represented by the $7,000 mortgage.

3. The evidence offered by both parties in reference to the value of the North Dakota lands took a wide range, both upon direct

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and cross-examination of the witnesses. Perhaps some testimony not strictly admissible was received over the objection and exception of plaintiffs; but it was not of a character to justify a reversal. The extent to which a witness as to the value of property may be cross-examined rests in the sound discretion of the court, in the exercise of which in this case we discover no abuse. Subsequent to the consummation of the contract between plaintiffs and defendant, defendant hypothecated the executory contract received by him from plaintiffs to the bank at Mankato as security. The bank subsequently sold the land, and its cashier was permitted to testify the price received therefor. This testimony was probably inadmissible; but in view of the whole record, and the fact that the scope of evidence to prove the value of property not having a fixed market price rests largely in the discretion of the court, and the further fact that the court in its instructions expressly stated to the jury, and the charge had reference to this and other like testimony, that "what any particular piece of land has sold for is not evidence of the value of this property in question," we are of opinion that no prejudice resulted to plaintiffs. The charge sufficiently cured whatever error may have been committed in receiving the testimony.

4. Counsel for appellants are entirely right in the contention that a contract for the sale of the land, required by statute to be in writing, cannot, so long as the whole remains executory, be modified by parol agreement. Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34. But the rule has no application where the modified contract has been performed. Siebert v. Leonard, 17 Minn. 410 (433); Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 451; McClay v. Gluck, 41 Minn. 193, 42 N. W. 875. Defendant's evidence tended to show a complete performance of the orally-modified contract, and upon this theory the case was sent to the jury by the court. In this there was no error.

After the contract had been modified by the alleged parol agreement, plaintiffs entered into a further written agreement with Samson, by which Samson agreed to accept a deed from defendant, and to assume and agree to pay the mortgage indebtedness. This was in harmony with the claim of defendant that plaintiffs orally agreed

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to procure Samson to do so. This written contract was received in evidence over plaintiffs' objection. The objection was not well taken. The contract was admissible, not as binding Samson, but as against plaintiffs, who thereby corroborated the claim of defendant in this respect. The contract was entered into by Samson through a person who, it is claimed, was his agent. We discover no evidence, however, of such agency. But this is not important. There is no question but that plaintiffs executed the contract, and it was admissible against them.

5. Considerable evidence was offered relative to the value of the Mankato property, its rental value, that defendant ceased collecting rents therefrom after the delivery of his deed, and that thereafter Samson, through one Babcock, who testified that he was the agent of Samson, for a time collected the rent and took charge of the property. All this evidence tended to corroborate the claim of defendant that he had fully performed the contract, and that Samson agreed in fact to assume the mortgage indebtedness; and, though perhaps so far remote that it might properly have been excluded, there was no prejudicial error in its reception.

For the same reason, the submission of the special questions pertinent to this branch of the case, though wholly impertinent to the principal issues, was without prejudice. It is discretionary with the trial court whether special issues shall be submitted to the jury, and the discretion extends to the character of the questions, so long as they are pertinent to some branch of the case. It is clear, however, that the parties are not concluded by the determination of these questions by the jury respecting their rights in the Mankato property. The question whether defendant is liable to either plaintiff or Samson for the rents collected by him, or for the sale of part of the property subsequent to his conveyance thereof to Samson, is not involved in the action, and must be tried out in some other litigation. The court below properly so charged the jury. All evidence received upon the subject, together with the special verdicts, was simply corroborative of defendant's contention that plaintiffs were to procure Samson to assume the indebtedness upon that property.

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No other force or effect can be given either to the evidence or to the special verdicts.

6. A careful examination of the charge of the court discloses no reversible error. The newly-discovered evidence has reference mainly to the conduct of Samson, and his rights and liabilities in the matter, in no manner, other than collaterally, involved in the action, and there was no abuse of discretion in denying the motion upon that ground. The evidence sustains the verdict.

Order affirmed.

SIMPSON, J., took no part.

On January 20, 1911, the following opinion was filed:

PER CURIAM.

Counsel for plaintiffs, on application for a rehearing, call attention to the failure of the opinion heretofore filed specially to refer to one of the assignments of error challenging the refusal of the trial court to give one of his requests for instructions. On further examination of the record we find this assignment not well taken.

The written contract for the exchange of properties was subsequently modified by a parol agreement. Defendant contended that it was modified in three respects. Plaintiffs admitted the modification in two respects, but denied the third. There is no question but that the contract as modified in the respects conceded was performed by both parties. Such being the fact the bar of the statute of frauds was thereby removed from the entire contract. Substantial part performance is sufficient for this purpose. 3 Dunnell, Dig. § 8885. Plaintiffs cannot accept performance of the undisputed changes and reject the other.

Application for rehearing denied.

JAGGARD and SIMPSON, JJ., took no part.

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D. D. McINNIS v. NATIONAL CASUALTY COMPANY.[1]

January 6, 1911.

Nos. 16,791—(150).

Partnership — contract not ambiguous.

Action to recover from the defendant upon a contract between the parties whereby the defendant agreed to pay to the plaintiff $1,000 in consideration of his retiring from a copartnership which was state manager of its casualty business. *Held*, construing the documentary evidence referred to in the opinion, that it was not ambiguous in its terms, that the evidence was sufficient to sustain a verdict for the plaintiff, and that the trial court did not err, either in its rulings as to the admission of evidence or in its charge to the jury.

Action in the district court for Hennepin county to recover $1,000, in accordance with the terms of a certain contract. The answer denied the allegations of the complaint, and set up that if any such agreement was made by defendant, it was without consideration; set out the written agreement contained in the opinion, and alleged that defendant indorsed its approval thereon but was not a party to it, and there was no consideration for its approval. The reply was a general denial. The case was tried before Simpson, J., and a jury which returned a verdict in favor of plaintiff for $1,034. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Einar Hoidale, H. L. Hoidale, and *Henry C. Walters,* for appellant.

Arthur Christofferson and *J. A. A. Burnquist,* for respondent.

START, C. J.

This action was brought in the district court of the county of Hennepin to recover from the defendant $1,000. The complaint alleged in effect that the defendant was a corporation, and that on

[1]Reported in 129 N. W. 125, 388.

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April 22, 1909, the defendant entered into a contract with plaintiff to pay him $1,000 in consideration of his retiring from the agency of Barnes & McInnis, as state managers of the defendant, and that he did so retire. The answer admitted that the defendant was a corporation, denied the other allegations of the complaint, and affirmatively alleged that, if the agreement alleged in the complaint was in fact entered into, there was no consideration therefor, and, further, what the terms of the alleged agreement were, as it was informed and believed. There was a verdict for the plaintiff for the amount claimed. The defendant appealed from an order denying its blended motion for judgment notwithstanding the verdict or for a new trial.

The assignments of error raise the questions whether the verdict is sustained by the evidence and whether the trial court erred in its rulings as to the admission of evidence or in its charge to the jury.

There was evidence tending to show the following facts:

The plaintiff and G. W. Barnes were partners under the firm name of Barnes & McInnis, having their place of business at Minneapolis, and as such were the state managers of the defendant's casualty insurance business. The plaintiff had been, for some thirteen years prior to entering the defendant's services, engaged in casualty insurance business as an officer of a company whose business the defendant reinsured. On February 27, 1909, the parties entered into a written agreement (Exhibit C), the here material provisions of which are as follows:

"Any time on or after June 1, 1909, should either party desire to retire from the agency of Barnes & McInnis, state managers of the National Casualty Company of Detroit, such retirement shall be subject to the following conditions:

1. Such retirement to be fully concurred in by the remaining party.

2. That such retirement shall be concurred in by the National Casualty Co.

3. That the agency name, Barnes & McInnis, shall remain unchanged for a period not to exceed six months from date of retire-

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ment of either party, subject, however, to change at the option of the remaining party.

4. That said retiring partner shall give at least thirty (30) days' notice of intention to retire to said remaining partner and said company.

5. That said retiring partner agrees not to engage in the business of casualty insurance within Minnesota for a period of not less than six (6) months from consummation of this agreement.

6. That said retiring partner agrees to accept from said National Casualty Co. the sum of $1,000. * * * Same to be in full settlement of all equitable claims said retiring partner may have against or hold in said agency, or the business by it controlled.

7. Said parties agree that, in event of incompatibility and disagreement that said company shall nominate which party shall retire, and that such decision by said company shall be final.

8. Said parties agree that should either party to said agency die during the pendency of this agreement, that the equitable value of the interest of said deceased shall be $1,000, payable as hereinbefore stated, and said payments shall constitute full settlement of all claims or interest in or against said agency or the National Casualty Co."

This agreement was signed by each of the partners. Then followed immediately below their signatures this provision, "Approved and accepted this 27th day of February, 1909," which was signed by the vice president and manager of agencies for the defendant, whose authority to represent the defendant was conceded.[1]

On April 15, 1909, the vice president of the defendant saw the plaintiff, and told him the company did not want Barnes to resign from the agency, and wanted him to stay, and that, in view of the fact that he and the plaintiff did not get on well together, and that the plaintiff was going to leave the service June 1 he would like to have him leave at once. The plaintiff replied that the company could have his resignation if it would take care of him and his contract. Thereupon, and on April 17, he wrote a letter (Exhibit A) which was to the effect following:

"At your request I herewith tender my resignation as a member of

[1]See opinion on page 161.

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the firm of Barnes & McInnis Agency, providing, however, that the company will agree to take care of my interests the same as if I continued with them up to the first of June. The memorandum or agreement [Exhibit C] entered into between yourself, Mr. Barnes, and myself, dated February 27th, to be carried out the same as originally intended and the same salary that I now receive to be continued up to June first.

In view of the fact that I am willing to continue as agreed up to June first, it seems to me that my position is fair, and when my resignation is accepted, you can rest assured that, in leaving the services of the company you will receive nothing in return but my hearty support and best wishes."

The vice president answered in writing to this effect:

"I am in receipt of your resignation as one of our Northwestern managers, and regret that you are severing your connections. * * * I appreciate your attitude toward the company and the Northwestern Department. I could not have entertained any other idea of what your attitude would be. Your proposition relative the May salary is fair, and will be agreed to. Other payments as per contract will, of course, be remitted promptly."

The plaintiff retired from the agency in accordance with his resignation. The testimony of the plaintiff was contradicted in some important particulars by that of the vice president. The trial court submitted to the jury the question whether there was an agreement between the parties to the effect that, if the plaintiff retired from the agency before June first, as requested, he should be paid $1,000, as provided by the contract of February 27. (Exhibit C.) The defendant contends that the evidence was not sufficient to sustain the finding that such contract was made, and especially that no consideration was shown for such alleged agreement.

The record does not justify the claim. The documentary evidence must be construed as a whole, and with reference to the undisputed relations of all the parties to each other. So construing them, the contract of February 27 (Exhibit C) is clear and definite. The subject-matter of the contract was the defendant's agency and business which was conducted for it by the partners, and the protection of the

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business in case one of the partners should, on or after June 1, retire. The business was protected by making such retirement conditioned upon the defendant's concurrence, and the giving to it the right to say, in case of disagreement, which one of the partners should retire, and by a covenant on the part of the retiring partner not to engage in the casualty business in Minnesota for six months thereafter. In consideration of these stipulations the retiring partner agreed to accept from the defendant $1,000 in full settlement of all claims against the agency or business by it controlled. The defendant's acceptance and approval, which was a part of the contract, necessarily refer to the provisions of the contract we have indicated.

It is true, as urged by defendant, that by the terms of this contract it was not obliged to pay the retiring partner anything unless he retired on or after June first. This brings us to the question whether the date of retirement was changed by an agreement based upon a valuable consideration. We are of the opinion that there was such a contract, for the evidence is sufficient to sustain a finding that the defendant desired that the plaintiff should retire before June first and requested him to do so, and that he assented upon the express condition that he should have the same rights under Exhibit C as he would have if he continued in defendant's service to June first. The defendant assented to the condition, and in consideration thereof the plaintiff did retire as requested. The retirement of the plaintiff before June first was a sufficient consideration for the promise of the defendant. We hold that this modification of the original contract was based upon a valid consideration, and was established by a clear preponderance of the evidence.

The next group of assignments of error relate to alleged errors of the trial court in rejecting defendant's offer to show by oral evidence what the parties intended by Exhibit C. There were a number of rulings along this line, but they were all summed up in this offer: "Defendant offers to prove that the words: 'Approved and accepted this 27th day of February, 1909. National Casualty Company, by W. G. Curtis, Vice President'—were understood by all the parties to mean simply that the National Casualty Company approved of the arrangement between G. W. Barnes and D. D. McInnis, and accepted

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the trust imposed upon it under the terms of the arrangement, and the further understanding that it involved no primary obligation on the part of the defendant."

The defendant claims that this case falls within the rule that, where ambiguous words or terms are used in a written contract, it is proper to show in what sense they were understood by the parties. Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443. The contract in this case is, in form, awkward; but there is no ambiguity in the words used by the parties to express their intentions. The trial court correctly rejected the offered evidence.

Other rulings on the admission of evidence are here urged, which we have considered, and find no reversible error therein.

The defendant further claims that the court erred in charging the jury that plaintiff could sufficiently prove the modified agreement by a fair preponderance of evidence. This was not error. The court properly refused to give the defendant's requested instruction, to the effect that, in order to show a modification of Exhibit C, it was not sufficient for the plaintiff to prove ambiguous transactions, from which the defendant might have inferred that the original contract was still in force; for the request rested upon an assumption of ambiguity not justified by the evidence.

Order affirmed.

SIMPSON, J., took no part.

On January 20, 1911, the following opinion was filed:

PER CURIAM:

The appellant in a petition for a reargument calls our attention to a mistake in the opinion in the name of its manager of agencies. It was assumed, inadvertently, by reason of a similiarity of names, that the vice president, whose authority in the premises was conceded, and the manager of agencies, were one and the same person. In fact, the name of the vice president was W. G. Curtis, and the manager of agencies was his brother, H. G. Curtis.

The mistake, however, in no manner affects the conclusion reached

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by the court; for the fact remains that the evidence is ample to sustain a finding that the manager of agencies requested the resignation of the plaintiff, and that the plaintiff replied that the company could have his resignation if it would protect him and his contract. It is also true that the manager of agencies denied this, and testified that he had no authority to demand the resignation or to make the plaintiff any promises; but he also testified that he was sent by the company to patch a peace between the partners, and that he had an interview with the plaintiff. The record does not show that the plaintiff had any notice of any limitation of the general authority of the manager of agencies. But, this aside, the record is conclusive that the plaintiff's letter of resignation (Exhibit A) referred to in the opinion was directed to the vice president, and not to the manager, and was answered by the vice president to the effect stated in the opinion.

Petition denied.

JAGGARD, J., took no part.

GREAT NORTHERN EXPRESS COMPANY v. NATIONAL SURETY COMPANY.[1]

January 6, 1911.

Nos. 16,797—(136).

Indemnity insurance — degree of care required of express messenger — question for jury.

Action on defendant's bond, whereby it promised to indemnify the plaintiff for any loss sustained by the culpable negligence of its express messenger, in connection with the duties pertaining to the position, which term was defined by the bond to mean a failure to exercise the degree of care which men of ordinary prudence usually exercise in regard to their own affairs. The alleged breach of the bond was the negligence of the messenger in failing to

[1] Reported in 129 N. W. 127.

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keep the doors of his express car chained on the inside, which enabled robbers to enter the car, overpower him, and to steal from the car $5,000. Verdict for defendant. *Held:*

1. The negligence of the messenger, which would render the defendant liable, would be a failure on his part to exercise, in connection with the duties of his position, that degree of care which men of ordinary prudence usually exercise in regard to their own affairs of like gravity.

2. The bond defines the standard of care to be exercised by the messenger, which the plaintiff could not enlarge, as against the defendant, by establishing rules for the conduct of its business; but a rule making it the duty of the messenger to keep the car doors chained was admissible in evidence for the purpose of showing what were the duties pertaining to his position.

3. The mere fact that the messenger failed to chain the doors, if he did so, did not as a matter of law render the defendant liable; for it was a question for the jury whether, under all the facts which the evidence tended to show, he omitted to do anything in connection with the duties pertaining to his position which a man of ordinary prudence would usually do in his own affairs of like importance.

Action in the district court for Ramsey county to recover $5,000 upon a bond guaranteeing plaintiff against the personal dishonesty or culpable negligence of certain employees. The answer admitted the execution of the bond mentioned in the opinion, and alleged that on May 12, 1908, while Perrine was employed by plaintiff as a messenger in a railway car en route from Seattle, Washington, to Vancouver, British Columbia, certain persons armed with deadly weapons and firearms, one of whom was dressed in the regulation and customary uniform of the train men operating and controlling the train, for the purpose of robbing the train and the passengers, boarded the train, forcibly entered the car, and overpowered, disarmed and beat and bruised Perrine, to such an extent that he was unable to protect the money or property in the car; that the moneys taken from the car while Perrine was in this condition amounted to $5,000, which had been entrusted to the care of Perrine by plaintiff. The case was tried before Kelly, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, it appealed. Reversed and new trial granted.

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M. L. Countryman, for appellant.
How, Butler & Mitchell, for respondent.

START, C. J.

Action in the district court of the county of Ramsey to recover $5,000, upon defendant's bond to plaintiff indemnifying it against loss by the culpable negligence of certain of its employees, of whom its express messenger, Joseph E. Perrine, was one. Verdict for the defendant. Appeal by the plaintiff from an order denying its motion for a new trial.

In the bond the plaintiff was designated as the employer, and thereby the defendant agreed to make good and reimburse the plaintiff any and "all pecuniary loss of money, securities, or other personal property belonging to the employer or in its possession as a common carrier, bailee, or warehouseman, sustained by the employer by or through the personal dishonesty or culpable negligence of any employee, for whom the company is or shall have become surety hereunder, in connection with the duties pertaining to the position to which he has been or may be appointed by the employer, and for which the employee shall be legally liable to the employer.

"The company shall not be liable * * * for any loss occasioned * * * by robbery, unless by or with the connivance or culpable negligence of the employee; and 'culpable negligence,' as used in this bond, shall be taken and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs."

The alleged breach of the bond is based upon the facts following: On May 12, 1908, the plaintiff delivered to its messenger, Perrine, then in charge of its express car, a package of money amounting to $5,000, which was to be carried in the car from Seattle to Mount Vernon, Washington. While the money was so in his possession, armed robbers entered the express car, overcame and bound him, and then stole the money, which was never recovered, and the plaintiff paid the amount thereof to the owner. On each side of the express car was a sliding door, which could be fastened from the inside by a hasp and chain. At its end was a door opening into the car from

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the platform. This door was provided with a lock, and with a chain fastener on the inside, by means of which, when the chain was fastened in place, the door could be opened only about three inches, so that a person from the outside could not unfasten the chain. The express messenger by these appliances could lock himself and money in his charge in, so that no one could enter the car, except by violence. The alleged negligence was that the messenger failed to keep the end door of the car chained, that it was his duty to keep the door chained, and that by reason of his failure to discharge the duty the robbers were enabled to enter the car and steal the money. This the defendant denied.

On the trial the plaintiff, for the purpose of showing what the duty of the messenger was with reference to keeping the doors of the car chained, offered in evidence this rule:

"Chain fasteners must at all times be applied to door, except when opened for purpose of receiving or delivering express matter. When train stops between stations, or at places where there are no agents, the door should never be opened, except as occasion demands, and then only the chain length, until you are satisfied everything is all right."

A foundation for the admission of the rule was shown, and there was evidence tending to show that the car door was not, at the time the robbers entered, chained. The trial judge sustained the defendant's objection to the admission of the rule, and it was excluded. In this connection he instructed the jury to this effect: Culpable negligence as used in this bond the parties have stipulated shall be taken to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs. This is the standard of judgment which the parties have adopted for themselves, and for that reason I rejected the offer of the plaintiff to show certain rules of the plaintiff with respect to its messengers, because these people are entitled to be tried by the standard that they themselves have set up and agreed to. The exclusion of the rule and the giving of the instruction are each assigned as error.

The pivotal question is whether the exclusion of the rule in con-

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nection with the instruction was reversible error. The negligence of the messenger, as defined by the bond, which, if followed by loss to the plaintiff, would render the defendant liable therefor, would be a failure on his part to exercise, in connection with the duties pertaining to his position, that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs *of relative gravity*. The words we have italicized are not found in the bond, but they are necessarily implied, for the degree of care exercised by men of ordinary prudence in their own affairs depends upon the importance of the matter in hand.

The first contention of the defendant is, in effect, that the rule was properly excluded, for the reason that the parties to the bond thereby expressly defined the standard of care to be exercised by the messenger, and that the plaintiff, by establishing rules for the conduct of its business, could not, as against the defendant, enlarge the stipulated degree of care. This must be conceded, but it does not follow that the rule was rightly excluded; for the primary question is whether the messenger, in connection with the duties pertaining to his position, exercised that degree of care which men of ordinary prudence would exercise in their own affairs of like importance. That he did not exercise this degree of care in connection with his duties was a proposition the plaintiff was bound to establish. While it could not, by arbitrary and unreasonable rules, affect the contract liability of the defendant, yet it was both competent and necessary for the plaintiff to show what were the duties of the messenger in connection with his position; otherwise, the jury would have no intelligent basis for determining the question of his alleged negligence. Whatever may have been true as to other rules offered in evidence, the one to which we have referred was neither arbitrary nor unreasonable, but a clear, concise, and reasonable statement of the messenger's duties with reference to keeping the doors of the car safeguarded by the chain fasteners. We are therefore of the opinion that it was error not to receive this particular rule in evidence, for the purpose of showing what duties pertained to the messenger's position.

It is quite obvious that the case of Fonda v. St. Paul City Ry. Co.,

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71 Minn. 438, 74 N. W. 166, 70 Am. St. 341, is not here in point, for the reason that the plaintiff in that case was a traveler on the public streets, between whom and the defendant there were no contractual relations, and therefore it necessarily followed that the defendant's private rules for the guidance of its employees in the discharge of their duties were not admissible in evidence for or against either party, for they could only fix a standard of duty as between itself and its employees.

In this case, however, there were contractual relations between the parties, whereby the defendant undertook to indemnify the plaintiff against loss by reason of the negligence of the messenger in connection with the duties pertaining to his position. The purpose of offering the rule in evidence as to such duties was not to enlarge the defendant's liability on its bond, but to advise the jury what his duties in the premises were, so that they might determine whether he was negligent in that connection; that is, determine whether he omitted to do anything in connection with his duties which a man of ordinary prudence would have done in his own affairs of like importance.

It is also contended that, even if it were error to exclude the rule, it was not reversible error, for the reason that the oral evidence on the part of the defendant tended to show what the duties of the messenger were with reference to keeping the doors of the car chained. The record discloses evidence of this character, and except for the instruction of the court, which is here assigned as error, we should be inclined to yield to the contention in this respect. The tendency of the instruction, in connection with the rejection of the rule, was to impress the jury that any evidence, oral or documentary, as to the messenger's duties, was unimportant, and, in the judgment of the trial judge, immaterial. The exclusion of the rule and the instruction, considered together, as they must be, constitute prejudicial error.

One other assignment of error must be disposed of in view of another trial. The trial court refused to give the requested instruction: "If [the jury] find from the evidence that the express messenger did not fasten the chain of this door on the day in question, it is

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negligence within the meaning of the contract sued upon, which directly contributed to cause the loss, and that their verdict must be for the plaintiff, for the full amount sued on. * * * " This was properly refused, for it makes the entire case turn upon the question whether the messenger did or did not chain the car door. If he failed to chain the car door, then, as we have suggested, it was a question of fact for the jury, under all the facts disclosed by the evidence, whether such omission was negligence on his part within the meaning of the contract as we have defined it.

Order reversed, and a new trial granted.

SIMPSON, J., took no part.

EMMA PATZKE v. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY.[1]

January 6, 1911.

Nos. 16,805—(153).

New trial — evidence.

In this, a personal injury action, the plaintiff had a verdict for $15,000. *Held*, that the trial judge did not abuse his discretion in denying the defendant's motion for a new trial, on the ground that the verdict was not sustained by the evidence and that the damages were excessive.

Action in the district court for Carver county to recover $15,000 for personal injuries and $500 on account of expenses incurred thereby. The facts are stated in the opinion. The case was tried before Morrison, J., and a jury which returned a verdict in favor of plaintiff for $15,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. H. Bremner and *George W. Seevers,* for appellant.

Thos. F. Craven and *W. C. Odell,* for respondent.

[1]Reported in 129 N. W. 124.

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START, C. J.

On October 11, 1907, about ten o'clock in the morning, the plaintiff was a passenger upon one of the defendant's railway trains from Chaska to Merriam Junction, and was seriously injured in alighting from the train at her destination. This action was brought in the district court of the county of Carver to recover damages for the injuries so sustained, on the alleged ground that the defendant negligently failed to stop the train a sufficient length of time to enable her to alight safely therefrom, but that, on the contrary, it started the train suddenly, without warning, while she was in the act of stepping from the platform of her car, whereby she was thrown from the car. The defendant by its answer denied any negligence on its part, and alleged that the plaintiff's injuries were the result of her own negligence.

The result of the first trial of the action was a verdict for the plaintiff for $7,500, which was set aside and a new trial granted by the trial court. On the second trial there was a verdict for the plaintiff for $12,000, and defendant appealed from an order denying its blended motion for judgment or a new trial. This court ordered a new trial, on the ground that the testimony of the plaintiff as to the way she was injured was practically uncorroborated and so manifestly against the great preponderance of the evidence that it was an abuse of discretion to deny the motion for a new trial. See 109 Minn. 97, 123 N. W. 57. Upon a third trial of the case a verdict was returned for the plaintiff for $15,000, and the defendant appealed from an order denying its motion for judgment or a new trial.

The assignments of error raise the general question whether the verdict is sustained by the evidence. It is not a case where the record discloses no evidence tending to support the verdict; hence the defendant is not in any event entitled to judgment notwithstanding the verdict. The question in its last analysis is whether the verdict is so obviously and palpably against the great weight of the evidence that it was an abuse of discretion on the part of the trial judge not to grant the defendant a fourth trial.

It appears from the record in this court on the first appeal that

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the plaintiff testified that she did not attempt to leave the car until it stopped at the station platform; that a man and a woman, she did not then know where they lived, went down the car steps ahead of her; that she followed them, but the car started while she was going down the steps and threw her down. The persons who preceded her were not called as witnesses on the second trial, and the result was that the plaintiff's testimony as to the details of the accident was practically uncorroborated, a circumstance to which we gave much importance on the first appeal. In this respect the evidence was materially different on the third trial.

The plaintiff on that trial testified, in reference to the way in which she was injured, substantially the same as on the second trial, and to the effect following: That when the station was called and the car door opened, she gathered up her packages and started to leave the car; that a man and woman (Mr. Norris and his sister, Mrs. Gilbert) went ahead of her, and she followed them; that they went down the platform steps before she did; that the car was standing still when she attempted to get off the car; that in doing so she took hold of the handrail with her left hand, her packages being in her right, and as she was about to step on the station platform the train suddenly started and she fell off. Mr. Norris and Mrs. Gilbert were witnesses on the last trial, and testified to the effect that they were on the train and in the same car with the plaintiff; that they did not leave the train until it stopped at the station platform; that when the station was reached the plaintiff arose in her seat with her packages in her hands and stepped into the aisle, then stepped back, and they passed out ahead of her, and went out of the car and upon the station platform; that they did not see her when she fell from the car, nor after they passed her, but on their way to the waiting room of the depot Mrs. Gilbert's attention, as she testified, was arrested by a noise, and she walked back a few steps, and saw some men carrying the plaintiff, and she followed them into the depot; and that the plaintiff was crying hard and seemed to be in pain.

We find nothing in the testimony of either Mr. Norris or Mrs.

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Gilbert inherently improbable or suggestive of a purpose to testify falsely. Nevertheless they may have been mistaken.

It was the contention of the defendant on the trial that the plaintiff walked off the car before it stopped, and at a point several hundred feet from the station platform, and at a time when the train was going some eighteen miles an hour. This claim was directly supported by the testimony of three eyewitnesses, who testified, in effect, that they saw the plaintiff walk off the car under the conditions claimed. The testimony of the eyewitnesses was corroborated in a greater or less degree by some seven other witnesses, who testified to matters tending to show that the plaintiff could not have been injured as claimed. Counsel for the defendant here urges that the testimony of the plaintiff as to the manner in which the accident occurred is incredible, and that the only evidence in the record to support her claim is her own testimony. If the record justifies this sweeping claim, then we would have practically the same question which we had on the first appeal. The record, however, does not justify the claim.

It was a fair question for the jury whether plaintiff's testimony as to the manner of her injury was incredible. The claim that the plaintiff's testimony was not corroborated by that of Mr. Norris and his sister is supported by an ingenious and able argument; but a careful reading of their testimony clearly indicates that the claim is without merit. It is an admitted fact in the case that the plaintiff was injured in attempting to alight from the train. But one of the controlling questions is whether she attempted to do so after the train stopped at the station platform, as she testified, or whether she made the attempt before the train reached the platform and while it was going at the rate of speed claimed, as testified to by the eyewitnesses. The testimony of Mr. Norris and Mrs. Gilbert directly tends to corroborate the plaintiff. It is true they did not see her after they passed her in the aisle of the car on their way out and before the accident; but they did not leave the car until the train reached the station platform and stopped to discharge passengers. If they were not mistaken in their testimony, then the plaintiff did

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not attempt to alight from the car while it was moving, or before it stopped at the station platform. It follows that their testimony corroborates the plaintiff, and that it conflicts in this respect with the eyewitnesses, and that it was a question for the jury to determine who of the witnesses were mistaken and what was the truth in the premises.

While the evidence makes the case a perplexing one, we are of the opinion, based upon a consideration of the entire record, that the verdict on the last trial is not so obviously against the weight of the evidence that it was an abuse of discretion for the trial judge to deny defendant's motion for a new trial. On the contrary, we are of the opinion that he properly exercised his discretion, in view of the result of three trials of the action.

In reaching this conclusion, we have not overlooked other points urged in defendant's brief, nor its claim that the damages are excessive. The undisputed evidence shows that the plaintiff was at the time of her injury a young woman some twenty years of age, and in fair health; that by reason of injuries to her arm, hip, which is paralyzed, leg, and other parts of her body, due to the accident, she has ever since been unable to stand on her feet, or walk, even with crutches, and has to be carried from her bed to a chair and back again; that there is little or no probability that she will ever recover; and that so long as she may live she will be a helpless and hopeless cripple. We are of the opinion that the award of damages is only fairly compensatory.

Order affirmed.

SIMPSON, J., took no part.

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GEORGE V. KOLLER v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and Another.[1]

January 6, 1911.

Nos. 16,840—(180).

Injury to fireman — questions for jury.

A fireman, to take notice and observation of the condition of a semaphore signal by which the movements of his train were controlled, projected his body out of the gangway between the engine and tender, and was struck on the head by a pole placed near the track to sustain a telltale wire near the approach of a bridge, and seriously injured. It is *held*, that

1. The questions (1) whether the defendants were negligent in maintaining the pole in the particular place, (2) whether plaintiff was guilty of contributory negligence in looking for the semaphore from his position in the gangway, and (3) whether he assumed the risk of danger of contact with the pole, were on the evidence questions of fact for the jury.

2. The evidence is not so far conclusive in defendants' favor upon either question as to justify interference by this court.

3. It is not the province of the supreme court to reconcile conflicting evidence, nor to solve doubts arising therefrom. That duty rests upon the jury and trial court.

4. No reversible errors are disclosed by the record.

Action in the district court for Ramsey county against the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Great Northern Railway Company to recover $25,000 for personal injuries. The facts are stated in the opinion. The negligence alleged in the complaint is stated in the third paragraph of the opinion. The separate answer of defendant Great Northern Company alleged it had no knowledge or information sufficient to form a belief as to the allegations of the complaint, and therefore left plaintiff to make such proof thereof as he might be advised. The separate

[1]Reported in 129 N. W. 220.

[Note] Liability of street railway company for injury to employee from poles placed too near track, see note in 15 L.R.A.(N.S.) 1109.

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answer of defendant Omaha Company set up the contributory negligence of plaintiff, and alleged that if plaintiff had a cause of action it was solely by reason of the act of congress of April 22, 1908, and the circuit court of the United States alone had jurisdiction of the subject matter of the action. The reply admitted that plaintiff was employed upon a train engaged in conducting commerce between the states and would have a cause of action under the act of congress, and denied the other allegations of the answer.

The case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for $7,500. The defendants moved separately for judgment in their favor notwithstanding the verdict, or for a new trial. The motions were denied. From the order denying the motions, defendants appealed separately. Affirmed.

James B. Sheean and *Royal A. Stone,* for appellant Chicago, St. Paul, Minneapolis & Omaha Railway Company.

M. L. Countryman, for appellant Great Northern Railway Company.

W. R. Duxbury, for respondent.

Brown, J.

The facts in this case are substantially as follows: Between St. Paul and Minneapolis defendant Chicago, St. Paul, Minneapolis & Omaha Railway Company uses in the operation of its trains two parallel tracks belonging to the defendant Great Northern Railway Company; the right being secured by a lease or traffic arrangement with the latter company. These particular tracks are used exclusively in the passenger train service, and trains moving over the same are controlled by the block signal system. Under this system by the passage of trains semaphore signals are set automatically by electric current, and indicate to other trains following whether the track is clear or obstructed. The semaphore signals are erected between the tracks at convenient points for observation by employees in charge of moving trains.

About four miles from Minneapolis, in the direction of St. Paul, a bridge extends over these tracks, described in the record as a "low bridge;" that is, a bridge so low as to prevent those engaged upon box

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cars in the freight service from passing under the same in a standing position. As a warning to those thus engaged "telltale signals" are placed on each side of the bridge, with which they come in contact before reaching the bridge and are thus reminded of danger ahead. The telltale signals are straps of leather attached to a wire extended a proper distance above and over the tracks. The wire is attached to upright poles erected between the tracks. One of these poles, the alleged cause of plaintiff's injuries, was placed between the two passenger tracks, which tracks at this point are about ten feet apart. It is the duty of both engineer and fireman to keep a watch for the block signals and to observe their condition, for thereby the movement of the train is controlled. Plaintiff was in the employ of the Omaha Company as a fireman on one of its passenger trains.

On the day of his injury his train was proceeding from St. Paul to Minneapolis. A short distance before reaching the low bridge referred to, he was occupied in shoveling coal into the fire box of the engine, at the conclusion of which he stepped to the side of the engine, in the gangway between the engine and tender, to take note of the condition of the semaphore a short distance beyond the bridge. He stepped to the edge of the deck or floor of the tender, took hold of the handholds on the outer side, one on the tender and the other on the engine, leaned out to look for the signal, and, he claims, was struck by the pole supporting the telltale signals, thrown from the engine, and severely injured. He subsequently brought this action to recover for his injuries, alleging as grounds for his action the negligent erection and maintenance of the telltale pole in too close proximity to the track over which the train was operated. Plaintiff had a verdict, and defendants appealed from an order denying their motions, separately made, for judgment notwithstanding the verdict or a new trial.

It is the contention of both defendants in support of the motion for final judgment that the telltale pole was a proper and necessary structure, and that the evidence wholly fails to establish a case of negligence in placing the same between the passenger tracks; (2) that it wholly fails to show that plaintiff came in contact with it when he leaned out of the gangway to take notice of the condition

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of the semaphore; (3) that it conclusively appears that he was guilty of contributory negligence in making his observation in this manner; (4) that he knew of the presence of structures of this character in close proximity to the track and assumed the risks; and, therefore, that the trial court erred in denying the motion for judgment notwithstanding the verdict. The same contentions are made in support of the motion for a new trial, and, further, that the court erred in its instructions to the jury.

1. There can be no question but that the pole was a necessary structure. Its purpose, in connection with another pole between other tracks, was to sustain the telltale wire, a contrivance prudence required the company to maintain for the protection of its employees. The question, so far as involves the issue of negligence, is whether the pole was necessarily placed and maintained between these tracks, or whether it could have been placed elsewhere, between other tracks, and made to serve the same purpose, and with less danger to those operating trains.

The law is well settled that the railway company may place structures and signal posts along and adjacent to its tracks, but in doing so must act with due regard to the safety of its employees. They must be placed, when practicable, at a reasonably safe distance from the track, so as not to endanger those operating trains. When impracticable to so place them, and it becomes necessary to locate them in dangerous proximity to tracks, notice and warning to employees is necessary.

In the case at bar the question whether the particular pole was necessarily placed between the passenger tracks, and whether it was impracticable to place it elsewhere, was submitted to the jury. Our examination of the record discloses evidence tending to show that the pole was not necessarily placed between these tracks. There is substantial evidence to the effect that it could, without impairing its usefulness, have been placed between the passenger and an adjoining freight track, which were in the neighborhood of twenty feet apart, and the jury was justified in finding that, had it been placed at that point, it would not have endangered employees in the

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least. We therefore affirm the conclusion of the jury that it was negligently placed and maintained between the passenger tracks.

2. As respects the liability of defendants, no distinction can be made between them. Moon v. Northern Pacific R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. 194. The tracks were owned and controlled by the Great Northern Company, and the Omaha Company was using the same and operating its trains thereon under a traffic arrangement or lease with that company. For the negligent maintenance of the telltale pole, under the issues as made and submitted to the jury, both companies are liable. The question of warning employees of dangerous structures in close proximity to the tracks did not arise upon the trial. The court submitted the case to the jury without reference to the subject of warning, saying that if the pole was necessarily placed and maintained between the passenger tracks plaintiff could not recover. It follows that the contention of counsel for the Great Northern Company that it was under no duty or obligation to warn and instruct employees of the Omaha Company need not be considered. The question is not presented by the record.

3. The assignments of error challenging the correctness of the instructions to the jury have been carefully examined, with the result that no reversible error appears. The charge, taken as a whole, was a full and fair statement of the issues presented, and clearly informed the jury of the rules of law guiding their deliberations.

4. We have also given attention to the claim that plaintiff was guilty of contributory negligence, with the result that in our opinion the question was properly submitted to the jury.

It appears from the evidence that customarily observations of semaphore signals were taken by firemen from whatever position they happened to occupy when called upon to do so—sometimes through the window in the cab of the engine, one immediately in front of the fireman's seat and one at the side of the cab, and again by leaning out of the gangway, as in the case at bar, far enough to be enabled to discover it. There is no evidence that plaintiff knew of the presence of the telltale pole at this particular place. He testified that he was not aware of its presence. Nor is the suggestion

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that when he projected his head out of the gangway the pole was immediately in his view, and could have been plainly seen, conclusively sustained by the evidence. Plaintiff testified, both on direct and cross-examination, that when he leaned out to take his observations he was immediately struck by something and thrown from the engine. If this testimony be true, then it is clear that he did not have time to look forward, and could not have seen the pole. The question was one of fact for the jury.

The same may be said in reference to the further contention that plaintiff assumed the risk of injury from this and other structures along the track. Johnson v. St. Paul, M. & M. Ry. Co., 43 Minn. 53, 44 N. W. 884; Clay v. Chicago, M. & St. P. Ry. Co., 104 Minn. 1, 115 N. W. 949; Koepsel v. Minneapolis, St. P. & S. S. M. Ry. Co., 100 Minn. 202, 110 N. W. 974; Flanders v. Chicago, St. P., M. & O. Ry. Co., 51 Minn. 193, 53 N. W. 544. Plaintiff had been employed upon this run in the neighborhood of two months, and the evidence is not clear that he was aware of this or any other structure near enough to the track to endanger the safety of employees operating trains.

5. The important and serious question in the case is whether plaintiff was struck by the telltale pole at all. It is contended by both defendants, with much earnestness and force, not only that the evidence is clearly and palpably against the conclusion that plaintiff was so injured, but also that it was practically impossible, from the position he occupied in the gangway, to have come in contact with the pole. We have given the record and defendants' claims upon this branch of the case careful attention, reaching the conclusion, though not without some feelings of doubt, that the trial court properly submitted the question to the jury. Whatever doubts we entertain, arising as they do from a reading of the cold record and without the advantage of the presence of the witnesses, are overcome by the fact that two learned and impartial judges, with the advantage of seeing and hearing the witnesses, have sent the case to two separate juries. The first jury disagreed, and the second returned the present verdict for plaintiff, which has received the approval of the trial court. In view of the state of the evidence, we are clear

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that it is not a case for judgment notwithstanding the verdict, and no substantial purpose will be served by sending the issues back for a third trial. We therefore affirm the order appealed from.

It appears that the telltale pole was between the passenger tracks, which were about ten feet apart. The distance between the pole and the gangway floor, at a height of three feet, was forty-two inches. The distance between the pole and tender, at a height of ten feet, was twenty-three inches. Plaintiff was standing on the gangway floor, at the outer edge thereof, and, taking hold of the handholds fastened to the side of the engine and tender, leaned forward, and was, so he claims, immediately struck by something and thrown to the ground. It is contended that, in view of the distance from the pole, which is not substantially disputed, it was impossible for plaintiff to project his head out far enough to come in contact with the pole. There is force in this contention; but we are of the opinion that it was not in fact impossible that the accident could happen as claimed by plaintiff. He testified that, immediately upon leaning out, he was struck by something. He did not see the pole, but was positive that something hit him. The evidence does not disclose any other object or structure sufficiently near the track at this point with which he could have come in contact, and the conclusion must be, either that he lost his balance and fell off the engine, or that his story is true. In this situation we look to the record to ascertain whether his version of the matter is to any substantial degree corroborated. We find evidence of that character. The side of plaintiff's face disclosed evidence of a violent injury, and which might have been caused by contact with the pole. Two track laborers testified that he was picked up near the pole. Both were present at the time. One of them stated that plaintiff was about twenty feet, and the other five or six steps, from the pole. He was six feet tall, and at the height of his head from the ground, standing in the gangway, eleven or twelve feet, the pole was twenty-three inches away. The handholds were on the outer side of the tender, and, taking into account the necessary length of plaintiff's arms, and some swaying motion of the engine, it is not only possible, but very probable, that the side of his face came in contact with the pole.

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The evidence offered by defendants tends in the other direction. The conductor of the train testified that, when picked up after the accident, plaintiff's body was sixty-eight feet beyond the pole. If this testimony be taken as expressing the truth of the situation, it is a little difficult to understand how the pole could have been the cause of plaintiff's fall from the engine. It is improbable that, if struck by the pole, he would have been rolled or carried so far in that direction, though the train was running between twenty and twenty-five miles an hour. But doubt is thrown upon the accuracy of this testimony by that given by the engineer. The train was proceeding westward to Minneapolis. The telltale pole was one hundred fifty or more feet beyond or west of the overhead bridge already referred to. There was evidence that plaintiff was standing in the gangway while the engine was passing under the bridge; but it does not appear, at least not conclusively, that he was then leaning out looking for the semaphore. The engineer testified that he was paying no particular attention to the fireman until after the engine reached the bridge, but "I don't remember just where, somewhere between the bridge and the pole, I accidentally turned around, and as I turned around my fireman was going out through the gangway * * * on all fours." The witness was unable to say whether plaintiff was struck by the pole, but the inference from his testimony is that he fell off. However, the testimony that plaintiff fell or was thrown off between the bridge and the pole conflicts with the other evidence offered by defendant, that when picked up, limp and unconscious, he was sixty-eight feet beyond or west of the pole.

In this condition of the evidence we are not justified in interfering with the order of the lower court approving the verdict. We are not required to reconcile the conflicting evidence, nor to solve doubts arising therefrom. It was for the jury and the trial court to determine the facts. We have only to determine whether the evidence, taken as a whole, fairly tends to support the jury. We hold that it does.

Order affirmed.

SIMPSON, J., took no part.

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A. D. FORSYTHE v. JAMES C. MURNANE and Others.[1]

January 6, 1911.

Nos. 16,849—(175).

Reward for services.

The train of a railway company was held up and robbed. It offered a reward of $5,000 for the arrest and conviction of each robber. One of them was arrested, convicted, and sentenced to life imprisonment. There being several claimants for the reward, there was an interpleader, and the amount of the reward deposited in court. The appellants M. and D. were by the court's findings of fact and conclusions of law denied any share in the fund. *Held:*

1. A person having knowledge of a reward for the arrest and conviction of a criminal, whose arrest is not one of his official or contractual duties, who renders services which materially and proximately aid in the arrest and conviction, is entitled to an equitable and relative share of the reward, where the amount thereof is in court upon interpleader.

2. Upon the facts stated in the opinion, M. was, and D. was not, entitled to share in such fund.

Action in the district court for Clay county against Great Northern Railway Company to recover a reward of $5,000. Upon motion of plaintiff the court ordered various claimants to be made parties defendant. Thereafter Mark Madigan and C. B. Battan filed complaints in intervention, each demanding judgment for the full sum of $5,000, and that the other parties to the action had no share or right in and to the amount of the reward. Pursuant to stipulation in open court the defendant railway company paid the sum of $5,000 into court, and the court dismissed the action as to the company. The case was tried before Taylor, J., who made findings, as stated in the opinion. The separate motions of defendants Murnane and Delaney for a new trial were denied. From the order de-

[1]Reported in 129 N. W. 134.

[Note] What must be done in order to earn reward for arrest, see note in 7 L.R.A.(N.S.) 216.

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nying their motions, they appealed. Reversed and remanded as to defendant Murnane. Affirmed as to defendant Delaney.

Lawler & Lyons, for appellants.

Charles S. Marden, for respondent Forsythe.

Arthur J. Stobbart and *E. C. MacDonald,* for respondents McPhee and others.

Peterson & Adams, for respondent Whaley.

William Russell, for respondents Shermoen.

Nye & Dosland and *Fred C. Robertson,* for respondents Howe, Cummings and Riley.

Houpt & Field, for respondent Madigan.

START, C. J.

On September 12, 1907, at Rondo, Montana, the railway train of the Great Northern Railway Company, which included express and mail cars, was held up and robbed of $40,000. The robbery was committed by George Frankhouser, alias Ed. Smith, alias Joe King, and others. Thereupon the railway company offered a reward for the arrest and conviction of each of the robbers, and agreed to pay $5,000 for the arrest of each of them, if such arrest was followed by a conviction. Thereafter the plaintiff arrested Frankhouser within this state, who had been indicted for the crime in the District Court of the United States for the District of Montana. He was surrendered to the federal authorities, and duly convicted in the federal court, and sentenced to life imprisonment.

The plaintiff claimed the reward of $5,000, and brought this action in the district court of the county of Clay against the railway company and other claimants of the reward, who are designated in the complaint as defendants. The railway company admitted that the plaintiff and some or all of the defendants were entitled to the reward, and by stipulation of all parties it deposited the amount of the reward with the court, to be awarded to the parties who should be entitled to it, and was relieved of further liability. The parties interpleaded, and Mark Madigan and C. B. Battan intervened and claimed a share in the fund in court.

The cause was tried by the court without a jury, and findings of

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fact and conclusions of law were made to the effect that the plaintiff and all of the parties to the action, except the intervener Battan and the defendants Murnane and Martin P. Delaney, hereafter referred to as the defendant Delaney, were entitled to share in the fund. The court found as a fact that none of the excepted parties performed any services for which the reward was offered, and, as a conclusion of law, that neither was entitled to any portion thereof. The defendants Murnane and Delaney appealed from orders denying their respective motions for a new trial.

The first question raised by the assignments of error, to be considered, is whether the finding and decision of the trial court referred to are sustained by the evidence. If it is, then neither of the appellants has any further interest in the case, and their motions for amended findings of fact were properly denied. It is clear, upon the record, beyond reasonable controversy, that the appellants are not, in any event, entitled to the whole of the reward; and the question is narrowed to an inquiry whether the undisputed evidence shows that each or any of them is entitled to share in the reward. The evidence as to their respective claims is sufficient to require a finding of the facts, briefly stated, following:

The bandit, Frankhouser, was first arrested in the state of Montana by the efforts of the defendant Howe in connection with the other defendants named in his answer, including the defendant John Delaney; but while he was so in custody he escaped on March 21, 1908. On November 26, 1908, the plaintiff, Forsythe, arrested, in the county of Wilkin, in the state of Minnesota, a person then and there known as Wolf, who, as plaintiff was informed, was wanted for thefts from box cars of the Northern Pacific Railway Company in the county of Clay, this state, for whom he was also informed a large reward was offered, but by whom or for what offense he had no knowledge. He delivered Wolf to the defendant Whaley, the sheriff of the county of Clay, who detained him in the jail of that county at Moorhead by virtue of a warrant on the charge of theft from the Northern Pacific cars. He was discharged on this complaint, and immediately rearrested upon a warrant issued on the complaint of the defendant Delaney, charging him with stealing

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from the cars of the Great Northern Railway Company in the county of Clay. Upon this charge he was held in jail to await the action of the grand jury.

The defendant Delaney had a photograph of Wolf, and also a photograph of the escaped bandit, Frankhouser; but it did not occur to him that Frankhouser and Wolf were one and the same man. The defendant Murnane was and is a police officer of the city of St. Paul, and as such officer had charge of the bureau of identification of criminals, and had in his possession a photograph of Frankhouser, and had made a study of it. On December 18, 1908, and while Wolf was still in jail at Moorhead, the defendant Delaney showed the photograph of Wolf to Murnane, who then knew of the offered reward, and from it and the photograph of Frankhouser then in his possession he at once identified Wolf and Frankhouser as one and the same man. Thereupon Murnane and Delaney went to the office of the United States district attorney, and informed that office that the robber, Frankhouser, was then in jail at Moorhead under the name of Wolf. Upon receiving such information, the United States attorney instituted and carried forward such proceedings that Frankhouser was transferred from Minnesota to Montana for trial on the indictment there pending against him.

The defendant Delaney is, and during all the times herein mentioned has been, employed by defendant the Great Northern Railway Company as a special agent, commonly known as a detective, and by virtue of such employment it was his duty to do and perform all the things that were done and performed by him in the matter of the arrest, identification, and prosecution of Wolf or Frankhouser, and they were so done and performed in the line of his duty, and for the purpose of performing such duty.

Do these evidentiary facts justify the ultimate fact, found by the trial court, that neither Delaney nor Murnane performed any services for which the reward was offered? The reward offered was to the effect that $5,000 would be paid for the arrest of the robber, if followed by the conviction of the person arrested. The ar-

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rest is made by the offer a primary and essential act, and the evidence that the right person is arrested must be his conviction.

There is much conflict of judicial authority as to what constitutes an arrest, so as to entitle a person to claim the reward or an equitable share thereof. One line of cases takes what seems to be a narrow view of the terms of the offer and what constitutes an acceptance and performance thereof. In the case of McClaughry v. King, 147 Fed. 463, 79 C. C. A. 91, 7 L.R.A.(N.S.) 216, it is held that the offer can only be accepted and performed by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. Hook, J., dissenting in this case, said: "In such contracts, as in others, regard should not be had to the mere letter to the exclusion of the spirit. The fruit and profit of a nut lie in the kernel, and not in the shell." On the other hand, it was held, in effect, in Crawshaw v. City of Roxbury, 7 Gray (Mass.) 374, and in Haskell v. Davidson, 91 Me. 488, 40 Atl. 330, 42 L.R.A. 155, 64 Am. St. 254, that a substantial performance of the terms of the offer was sufficient, and that an actual arrest of the criminal by the claimant, or upon his request, was not essential, provided his services and information resulted proximately in the arrest. See 24 Am. & Eng. Enc. (2d Ed.) 955, and 34 Cyc. 1746.

We shall not attempt to lay down any general rule as to when a reward has been earned. We, however, hold upon principle that a person, having knowledge of an offer of a reward for the arrest and conviction of a criminal, whose arrest is not one of his official or contractual duties, who renders services which materially and proximately aid in such arrest and conviction, is entitled to an equitable share of the reward, based on the relative value of his services, where the amount thereof has been paid into court upon interpleader.

The undisputed evidence brings Murnane within the rule. It is true that when he rendered his services Frankhouser was in fact in jail under the assumed name of Wolf to answer another charge; but that Wolf was Frankhouser, the robber for whose arrest and conviction the reward was offered, had not been discovered. It was

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by Murnane's skill and information that such identification was made and the fact established that Frankhouser was in jail where the federal authorities could lay their hands upon him. It was this information by Murnane to the federal authorities which proximately resulted in Frankhouser being arrested, transferred to Montana, and there convicted on the charge of robbery.

It is clear that the defendant Delaney is not, in view of the facts found by the trial court, as to his contractual relations and duties in the premises to the Great Northern Railway Company, entitled to any part of the reward. Therefore it was not error to deny his motion for a new trial, and the order as to him is affirmed.

It is otherwise as to the defendant Murnane. It was error to deny absolutely his motion for a new trial, and the order must be reversed as to him, and cause remanded, with direction to the trial court to determine his equitable and relative share of the fund in court, and amend its findings of fact and conclusions of law accordingly.

So ordered.

SIMPSON, J., took no part.

EUNICE FOLEY v. WILLIAM J. HOY.[1]

January 6, 1911.

Nos. 16,855—(179).

Death by wrongful act — exclusion of evidence — charge to jury.

In an action to recover for the alleged wrongful death of plaintiff's intestate, the record is *held* to present no reversible errors.

Action in the district court for Ramsey county by the administratrix of the estate of Philip Foley, deceased, to recover $5,000 for the death of her intestate. The answer admitted the death, but expressly denied any negligence on the part of defendants.

[1] Reported in 129 N. W. 215.

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The facts are stated in the opinion. The case was tried before Kelly, J., and a jury which rendered a verdict for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Morton Barrows, for appellant.

C. D. & R. D. O'Brien, for respondent.

BROWN, J.

The facts in this case are as follows: Defendant, a general contractor, was engaged in the construction of the new St. Paul Hotel. Plaintiff's intestate was in his employ as a common laborer, being engaged on the day of his death in mixing mortar in a box placed upon the ground near the building. The framework of the building had been raised to the thirteenth story. Defendant had placed upon the roof an ordinary derrick for hoisting material used in the construction of the building. When the derrick was not in use, it was found advisable to lower its boom to a position of rest, and thus relieve the strain upon the mast and supporting guys. For this purpose a pile of planks, eight or ten in number, had been fastened together and chained or secured to the girders about four feet from the edge of the building, and upon this the boom was rested when not in use. While it appears that the planks referred to were securely fastened, it further appears that a shorter plank was laid upon the top of the pile, and was not fastened to the others or in any way secured. This situation existed for a considerable time before decedent's death. The mortar box at which decedent was at work was located upon the ground immediately below the derrick and the pile of planks. While he was so at work the loose plank referred to fell from the top of the building, striking decedent upon the head, causing instant death.

Plaintiff, as his legal representative, thereafter brought this action to recover for his death, alleging as ground thereof that defendant failed in his duty to exercise reasonable care in providing decedent with a safe place for the performance of his work. Plaintiff had a verdict, and defendant appealed from an order denying his motion in the alternative for judgment or a new trial.

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Defendant presses upon the appeal only those errors assigned in support of his motion for a new trial. The action of the trial court in denying the motion for judgment notwithstanding the verdict is not assigned as error. Nor is the sufficiency of the evidence to sustain the verdict called in question. Our consideration of the case is therefore confined to the alleged errors in law occurring upon the trial.

1. As already stated, the mortar box at which decedent was engaged at work was upon the ground immediately below the derrick and the planks upon which its boom rested when not in use. The accident was caused by the falling plank. The cause of the falling plank resolved itself on the trial into the question whether it was dislodged from its position by the wind. Evidence to show that such was the fact, and to negative the theory that it was either thrown or negligently pushed off the building by some workmen, was introduced by plaintiff, and of a nature to justify the jury in so finding. Defendant then offered to show the velocity of the wind during the two weeks preceding the accident, and that it ranged as high as fifty miles an hour. The exclusion of this evidence is complained of.

We discover no reversible error in the ruling on this question. Conditions were not shown to have been the same, with reference to the plank and its position, during the preceding two weeks; nor did the offer indicate that the direction of the wind was the same, or whether, if of greater velocity, it would have caught the plank in the same way as it did on the day of the accident. In the absence of this showing, it cannot be said that the evidence was at all material, and the ruling, therefore, is not reversible error.

2. The court submitted to the jury the question whether defendant was chargeable with negligence in locating the mortar box in the particular place, below the derrick. In this we discover no error. The question in issue was whether defendant exercised reasonable care in providing decedent with a safe place to work; and whether the location of the mortar box was a safe place, in view of the derrick and loose plank on the edge of the roof of the building immediately

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above, was the gist of the controversy, and was properly submitted to the jury.

It is true, as urged by counsel, that a contractor may adjust his instrumentalities and appliances at such places upon the premises as will be most convenient to an expeditious performance of the work. But clearly, in so doing, reference must necessarily be had to the proximity of other instrumentalities of a dangerous character; and whether the location of the box upon the ground below the derrick, used as it was to hoist material to the roof of the building, was an exercise of reasonable care to provide a safe place of work, presented a question of fact.

3. The court made some reference in its instructions to the obligation of defendant to exercise reasonable care in seeing to it that his other servants were discharging their duties in a proper manner. This part of the charge had no reference to any issue in the case, and in view of the fact that the jury was expressly instructed that, if the plank was caused to fall by the negligence of other employees, plaintiff could not recover, the reference to the defendant's obligations, if any, in respect to supervising the conduct of his servants, was without substantial prejudice.

4. Defendant's sixth request, relating to the question of the assumption of risks arising from the negligence of fellow servants, was not involved in the case, and, so far as it concerned the liability of defendant for the negligence of other employees in causing the plank to fall, was fully covered by the general charge of the court. The final summing up by the court clearly and distinctly stated the law controlling plaintiff's right of recovery, and the rights of defendant were fully protected.

This covers all questions discussed by defendant; the assignment charging misconduct on the part of plaintiff's counsel having been withdrawn.

We find no error, and the order appealed from is affirmed.

SIMPSON, J., took no part.

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JOHN MOLIN v. JOHN M. WARK.[1]

January 13, 1911.

Nos. 16,782—(173).

Driver's violation of statute in turning into street.

A driver of a motor vehicle, who negligently, because of excessive speed or not having his machine under control, fails to keep to the right of the intersection of a public street, when turning to the right, but crosses to the left instead, and collides with another vehicle lawfully upon that side of the street, whose driver is free from negligence, is responsible for the consequent damages. Sections 14, 16, c. 259, Laws 1909.

Evidence.

The evidence justified the jury in finding that appellant violated this law in not having his automobile under control, and that he negligently crossed over to the left side of the intersecting street, and collided with respondent's son, who was riding a motorcycle, lawfully upon that side of the street, and free from negligence.

Rulings of court.

No errors in the rulings or charge.

Action in the district court for Ramsey county to recover $5,000 for personal injuries to plaintiff's minor son, caused by the defendant negligently driving his automobile at an excessive and unlawful rate of speed and upon the wrong side of Rice street, St. Paul, to wit: the left hand side of the street. The answer admitted the collision with plaintiff's son, but denied the other allegations of the complaint, and alleged the contributory negligence of the son. The reply was a general denial.

The case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for $4,662.50. Defendant's motion for a new trial was denied on condition that plaintiff accept a reduc-

[1]Reported in 129 N. W. 383.

[Note] The law governing automobiles, see note in 1 L.R.A.(N.S.) 215; and note in 25 L.R.A.(N.S.) 40.

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tion of the verdict to $4,000. From the order denying the new trial on this condition, which was accepted by plaintiff, defendant appealed. Affirmed.

Harris Richardson and *Harold C. Kerr,* for appellant.

Briggs, Thygeson, Loomis & Everall, for respondent.

LEWIS, J.

This action is based upon the charge that respondent's son, Alfred Molin, while riding a motorcycle on Rice street, in the city of St. Paul, was negligently and unlawfully run into by appellant's automobile.

Young Molin testified that he and his companion, Jorgenson, were riding south on the right-hand side of Rice street at a speed of four or five miles an hour, and when nearing Central avenue they saw an automobile coming from the east on Central avenue; that it turned rapidly into Rice street, and ran in a diagonal direction across to the west side; and that he (Molin) thereupon turned toward the curb, for the purpose of passing to the right of the automobile, when the collision occurred. He said: "As soon as I noticed the automobile coming, I threw off my power and applied my brakes. With that it was too late. * * * It was almost a second's work. It wasn't very long. I applied my brakes, and it happened. It was all over. * * *"

Jorgenson, who was also riding a motorcycle, testified that they rode down the west side of Rice street at the rate of six or seven miles an hour, and said: "When we just were going to make the turn, the automobile came around. We didn't have time to think. All we did was to see something come around the corner and then smash. * * * It wasn't hardly more than two seconds or so. All we did was see it, and that was all. We saw it, and then I didn't know where we was." This witness claimed that the automobile was running from twenty-five to thirty miles an hour when it came around the corner from Central avenue.

Both Molin and Jorgenson testified that they were within five or six feet from the west curb, and just before seeing the automobile come around the corner they had swung a little closer to the curb.

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for the purpose of being in position to make the turn into Central avenue to go east. Jorgenson was thrown from his motorcycle, but did not get under the automobile.

All of the witnesses agreed that the collision occurred at a point about forty feet north of Central avenue, in front of Kamp's confectionery store, on the west side of Rice street, and that the automobile had practically come to a stop, with the left wheels close to the curb, when the impact occurred. Molin was found under the automobile, lying with his head towards the curb and his feet extending a little beyond and just behind the right front wheel. The machine had to be lifted to get him out, and he was unconscious, his left leg broken in two places, and he was otherwise severely bruised and injured.

Appellant testified that he came from the east on Central avenue, and turned to the right to go north on Rice street; that he was not running more than four or five miles an hour at the time he reached the center of Rice street; that he had his machine under perfect control, and did not turn to the right side of Rice street, for the reason that he saw the two young men on their motorcycles coming down rapidly, a little east of the center of Rice street, apparently with their heads down and not seeing the automobile; and in order to avoid a collision with them he turned his machine to the west side of Rice street, and that after doing so the young men changed their course toward the automobile, and, just before the collision, Molin, who was in advance of Jorgenson, fell from his machine and slid, head foremost, with his motorcycle, under the automobile.

The witness Meyerding testified for respondent as follows: "I seen the automobile come around the corner there. It was going at a good rate of speed, and I don't know just what the rate of speed was, but it was coming quite fast, and it couldn't stay on the right side, and the boys there, Molin and Jorgenson, were coming down there on the west side of the street, and it didn't look to me as though they were coming very fast, and they were about three feet from the curb, so when they seen this here auto they hugged the curb as close as they could, and they didn't have any place at all. They were right up against the curb."

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And again: "Well, I noticed that it was going quite fast, and it didn't seem to be able to make the turn there, and I was expecting the automobile to hit the post there, the telephone post, and I said to the boy that was with me that there would be an accident, and I no more than said that than we seen this Jorgenson and Molin come down the street, and right by the post there they collided with the automobile and the motorcycles."

When asked the reason why the automobile turned to the west side of the street, he said: "Well, it was going so fast that he couldn't make the turn on the right side, so she had to go to the west side."

Another witness, Emma Berger, testified that she was standing on the porch of her house, two doors north from Kamp's store, on Rice street, and says that when she first saw the boys she noticed them coming down on the west side of Rice street, running six or seven miles an hour. In estimating the speed at which they were running, she made the comparison that she could run as fast as they were going, and that they were about six feet from the curb.

The impact was heard by several persons in the vicinity; the noise was not like the bursting of a tire, but was the concussion of the motorcycle with the automobile, or the noise made by the machines in the effort of the drivers to control them, or perhaps both. One witness stated that he heard it while inside of a building on the opposite side of the street. The fact that young Molin was found lying on the ground at right angles with the automobile, with his feet sticking out just behind the front right wheel, affords some slight indication that he may have fallen from his wheel and slid through the triangular opening between the guard and the wheel. According to the evidence the space between the step on the right hand side and the ground did not exceed ten inches. If he slid through the space between the step and front wheel, where the guard curves over the front wheel, the automobile must have been standing still at that time. But, even if this did happen, it is inconceivable how his machine passed through at that point.

There was some testimony on the part of appellant, and other witnesses for the defense, that there was a dent in the upper part of

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the guard over the right front wheel, and that the machine did not move forward more than three feet after the collision. If Molin's motorcycle slid under the guard, it could not have been the cause of the dent; and, besides, if the auto moved three feet after the collision, would Molin have been found close to the front wheel, if he passed under at that point? In all probability, both parties were driving much faster than the lowest estimates, and it was for the jury to decide how the accident occurred, and who was to blame.

The trial court correctly submitted the issue to the jury, and instructed them that if they should find that appellant was not in the exercise of reasonable care to avoid the collision in driving his automobile to the west side of the street, and Molin was not guilty of contributory negligence in endeavoring to avoid a collision by remaining upon the west side of the street, then appellant would be liable. Sections 14 and 16, c. 259, pp. 309, 310, Laws 1909, were enacted to avoid just such incidents as occurred on this occasion. Section 14 provides that persons walking or driving, or operating a vehicle, who are moving in opposite directions, shall slacken their pace, if necessary, and seasonably turn to the right, so as to give half of the traveled road, if practicable, and a fair and equal opportunity to pass, to the other; and "any such person shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left. * * * All vehicles, however, must keep to the right of the center of the street." Section 16 provides that upon approaching a dam, bridge, sharp curve, or descent, and upon approaching a crossing or intersecting highway, or in passing from a side street into a main thoroughfare, where persons or vehicles are not plainly discernible, a person operating a motor vehicle shall have such vehicle under perfect control, and the rate of speed shall not exceed one mile in eight minutes.

It was plainly the duty of appellant, in turning the corner from Central avenue into Rice street, to have his automobile under complete control, and to turn into Rice street on the right-hand side; and if the evidence warranted the jury in finding that appellant ran

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his car to the west side of the street, for the reason that he did not have it under control because of the high rate of speed at which he was running, or because of failure to exercise reasonable care with reference to parties traveling upon the west side of the street, then he was liable.

The court properly charged the jury that if Molin's motorcycle was struck by or came into collision with Jorgenson's motorcycle, thus causing the accident, then respondent could not recover, provided that if appellant was negligent in passing to the west side of the street, and that Molin and his companion were compelled to act hurriedly to avoid a collision with the automobile, and in doing so Jorgenson collided with Molin, thereby causing the latter to be thrown against or under the automobile, respondent would still be entitled to recover, if the accident would not have happened except for appellant's own negligence.

We have examined the several assignments of error argued in the brief, and discover nothing which calls for a reversal.

One assignment is directed to the remarks of respondent's counsel to the jury, as follows: "During the lifetime of a man who is twenty years old, handicapped as he is by that wound, injured as he is in the collar bone, some substantial and material allowance should be made. You can figure that out as well as I can; but it should be, in my judgment, something substantial and material to cover a period of some sixty years that is left to him, if he lives out the time that the tables of mortality allot to him." Counsel for appellant objected, and took exceptions to the remarks as to what the tables of mortality show as to the length of life, there being nothing of that kind in the case, whereupon respondent's counsel replied: "It is true the mortality tables are not in evidence. Whatever it is, for all the rest of his life he will have this crippled leg." The court remarked: "Well, you may take that back." As qualified by the counsel and the court, the jury could not have been prejudiced, and the size of the verdict does not indicate it.

We have examined each of the assignments directed to the charge of the court, and find no one of them well taken. The rules of law were carefully stated and the issues fully presented. The evidence

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was sufficient to sustain the verdict, as reduced, and there was no error in cutting the verdict down from $4,662.50 to $4,000.

Affirmed.

JAGGARD and SIMPSON, JJ., took no part.

BASTIAN BROS. COMPANY v. WEMOTT-HOWARD COMPANY.[1]

January 13, 1911.

Nos. 16,794—(176).

Sale — rejection of order.

Rule that an acceptance of an order for the purchase of goods, specifying terms different from those named in the order, is in legal effect a rejection of the order, applied to the facts stated in the opinion.

Action in the municipal court of St. Paul, by a corporation organized under the laws of New York to recover $100.40 for goods sold and delivered. The answer alleged that plaintiff was transacting business in Minnesota without having complied with the provisions of R. L. 1905, §§ 2888, 2889, and further alleged that if there was any sale or contract of sale between the parties, it had been canceled and rescinded by mutual agreement. The reply was a general denial. The case was tried before Hanft, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. Defendant's motion for a new trial was denied. From the order denying a new trial, defendant appealed. Reversed.

Charles J. Andre, for appellant.

Gilbert & Greenman, for respondent.

BROWN, J.

Plaintiff is a corporation doing business at Rochester, in the

[1]Reported in 129 N. W. 369.

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state of New York; defendant, a corporation doing business at St. Paul, this state. On September 18, 1908, plaintiff's agent solicited and obtained from defendant an order for certain political campaign goods, to be shipped from said Rochester to St. Paul. The order given the agent was in the following language:

Sold to—Wemott-Howard Co.

	Town	St. Paul	Via freight	
500	Oxyd & Gilt Small Fobs,	Bryan,	50.00 M.	25.00
500		Taft		25.00
288	Oxyd Bryan large bulk		1.05 net	25.20
288	Taft		1.05	25.20
				$100.40

C. H. Peterson.

It is conceded that the contract did not become effective until accepted by plaintiff at its home office in Rochester. It is also undisputed that at the time the order was given it was understood by and between defendant and plaintiff's agent that it was necessary that the goods be shipped out without delay, as they were valuable only in the then pending presidential campaign. And it was accordingly agreed by the agent that the shipment should be so made. Immediately after obtaining the order the agent communicated the same to plaintiff by letter, in and by which he directed shipment of the goods to be made by certain transportation lines "at once." Upon the receipt of the order from the agent, plaintiff accepted the same in the following language:

"Rochester, N. Y., Sept. 25, 1908.

"Wemott-Howard Co.,
"385 Jackson St.,
"St. Paul, Minn.

"We acknowledge with thanks your order placed with our M. B. Dillon, memorandum of which is as follows:

* * * * * * * * * * * * *

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"We expect to send by express on or about Nov. 1st, or as soon thereafter as possible."

The communication was received by defendant on September 26, and because of the fact that the agreement with plaintiff's agent required and called for the prompt, or "at once," shipment of the goods, and the further fact that the goods were valuable only during the campaign then pending, which would practically be at an end on the first of November, when plaintiff by its acceptance of the order proposed to ship them, defendant immediately, by a telegram sent to and received by plaintiff, canceled the order, and purchased similar goods of a local dealer at St. Paul, to an amount necessary to supply its trade.

It is claimed by plaintiff that the statement in the acceptance of the order that the goods would be shipped about November first was an error of one of its clerks, and that in fact on September 26th, and before the receipt of defendant's telegram, the goods were packed and delivered to a carrier for transportation to St. Paul. The goods arrived in St. Paul in due season, and defendant refused to accept the same, on the ground of its previous cancellation of the order. Defendant promptly notified plaintiff's agent, with whom the contract was made, and also plaintiff, that the goods were held subject to plaintiff's order. The agent stated to defendant, when informed of the facts, that he would sell the goods to other dealers, or return them to plaintiff, and requested defendant to hold them until he determined what to do. Plaintiff declined to accept a return of the goods, and thereafter brought this action to recover the value of the same. It is not claimed that the soliciting agent had authority to accept the return of the goods. Plaintiff had judgment in the court below, and defendant appealed from an order denying a new trial.

No contract is complete without the mutual assent of the parties thereto, and an offer to sell or to purchase imposes no obligations until it is accepted according to the terms of the offer. An acceptance upon terms varying from those contained in the offer is, in legal effect, a rejection of the offer, and puts an end to the negotiations, unless the party making the original offer acquiesces in the

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modifications proposed by the acceptance. Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126; Ames & Frost Co. v. Smith, 65 Minn. 304, 67 N. W. 999; Minneapolis & St. L. Ry. Co. v. Columbus Mill Co., 119 U. S. 149, 151, 7 Sup. Ct. 168, 30 L. ed. 376; Reid v. N. W. Imp. & W. Co., 79 Minn. 369, 82 N. W. 672.

By applying this rule we have no particular difficulty in reaching the conclusion in the case at bar that plaintiff's acceptance of defendant's order on terms varying therefrom, in respect to the time the goods were to be shipped, was in contemplation of law a rejection of the offer of purchase, at least an attempted modification thereof, and defendant's cancellation of the order was effectual, and terminated negotiations between the parties respecting this transaction. It was important that the goods be shipped out at once, and it was so agreed between defendant and plaintiff's agent. Plaintiff was informed of this fact by the terms of the order upon it by the agent containing directions to "ship at once," which thereby became an essential element of defendant's proposal to purchase. Disregarding this, plaintiff by its acceptance announced new terms, and stated that the goods would be shipped at a time when they would be of no value for any purpose. This clearly was a qualified acceptance, by reason of which the minds of the parties never met. Defendant's order was still executory, and it had the legal right to cancel it.

It is no answer that one of plaintiff's clerks erred in preparing the acceptance, and that plaintiff in fact immediately shipped out the goods. Defendant had the right to rely upon the written acceptance, and, moreover, the record contains no suggestion that it had notice of the alleged error, or of the fact of shipment, before sending the telegram cancelling the order, or before supplying its stock by purchasing similar goods elsewhere. In our opinion the cancellation effectually terminated the relations between the parties, and defendant is not liable.

Order reversed.

JAGGARD and SIMPSON, JJ., took no part.

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SAMELS LUMBER COMPANY v. ADOLPH KROPF and Others.[1]

January 13, 1911.

Nos. 16,800—(215).

Mechanic's lien — evidence.

In an action to foreclose a mechanic's lien, the findings of fact to the effect that certain material furnished the contractor by a third person was not in legal effect a part of the material furnished by plaintiff *held* sustained by the evidence.

Action in the district court for Scott county against Adolph Kropf, Franciscan Brotherhood of Minnesota, a corporation, and four other persons, to foreclose a mechanic's lien for material of the value of $535.69 upon certain property of that brotherhood. By stipulation, the Church of St. John at Jordan was made a party defendant. The separate answer of the brotherhood and of the Church of St. John admitted that certain items of materials were sold to and used by defendant Kropf in the school building mentioned in the complaint, but alleged that the items admitted were purchased by Kropf from and furnished by the Nelson Sash & Door Company, and on January 16, 1909, before plaintiff's lien was filed, Kropf paid the Nelson Sash & Door Company in full for such items; and alleged that plaintiff did not furnish to Kropf, or any other person, any labor or materials within ninety days prior to the filing of plaintiff's lien. The other defendants did not appear. The facts were stipulated in open court. The case was tried upon the pleadings and the stipulation, before Morrison, J., who ordered judgment of dismissal on the merits. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

Stringer & Seymour, for appellant.

E. Southworth, for respondents.

[1]Reported in 129 N. W. 370.

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BROWN, J.

Action to foreclose a mechanic's lien in which defendant had judgment, from which plaintiff appealed.

It appears from the evidence and findings of the trial court that on April 24, 1908, defendant entered into a contract with one Kropf for the construction of a school building at Jordan, this state. The contract price for the building completed was $28,980. The contractor agreed by the terms of the contract to furnish all labor and material employed or used in the work of construction. Between May 20 and October 14, 1908, plaintiff, a corporation, sold and delivered to Kropf, the contractor, lumber and material to be, and which was, used in the construction of the building, and of the aggregate value of $496.29, no part of which has ever been paid. On February 5, 1909, plaintiff made and filed in the office of the register of deeds of Scott county its claim for a lien upon the premises on which the building was constructed, and thereafter brought this action to foreclose the same. The last item of material was furnished by plaintiff on October 14, 1908. The lien statement was not filed until February 5, 1909. It was not, therefore, filed within the time provided for by statute, and plaintiff must fail in the action, unless its contention that it in fact furnished other material subsequent to the date named, and within ninety days from the date on which the statement was filed be sustained.

The facts in reference to this claim, as appears from the stipulation of facts, are as follows: During the negotiations for lumber and material for the construction of the building, the contractor and Frank A. Samels, president and manager of plaintiff, visited the offices of the Eddy Lumber Company, at Minneapolis, "and there it was agreed that said last-named company would furnish certain of said lumber, and ship the same to the contractor, and charge the same to said plaintiff. At the same time A. W. Eddy, the manager of said Eddy Lumber Company, was requested to ascertain from the Nelson Sash & Door Company the sum for which they would furnish said mill work. * * * That thereupon said Eddy Lumber Company obtained figures from said Nelson Sash & Door Company some days subsequent, and made known the same

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to [plaintiff's manager] and [the contractor, to which the contractor assented]. That thereupon said Eddy Lumber Company was requested by said Kropf in the presence of [plaintiff's manager] to notify said Nelson Sash & Door Company of said acceptance, and to notify them to prepare such mill work and ship the same to [the contractor] but nothing was said by either [the contractor] or [plaintiff's manager] about to whom said mill work should be charged. That said Eddy Lumber Company, assuming that it was the intention of said Kropf and of said Samels that said mill work should be charged in the same manner as the lumber to be furnished by said lumber company, notified the Nelson Sash & Door Company by telephone of the acceptance of their figures, and directed them to manufacture and ship the same to [the contractor], and charge the same to the plaintiff." The Nelson Company filled the order and charged the amount thereof, $2,495, to plaintiff.

The last item of material so furnished was upon November 12, 1908. And if this material is to be treated as having been furnished by plaintiff, because of the fact that its manager was instrumental in securing the same jointly with the contractor, and the fact that the price thereof was, without authority from either party, charged to plaintiff upon the books of the Nelson Company, then it is probable that plaintiff's lien statement was filed in time. The trial court found that this material was not furnished by plaintiff, and this finding is assigned as error.

We are unable from the record to discover, within the rule guiding this court, grounds for overturning the findings of the trial court upon this question. Though there is no controversy as to the evidentiary facts, the ultimate fact was for the trial court to determine. Plaintiff was in no manner interested, as surety or otherwise, with the contractor, nor responsible for the faithful performance of the contract. The Eddy Lumber Company had no express authority to direct the Nelson Company to charge the account to plaintiff; and though it was so charged, and plaintiff notified of the fact by the Nelson Company, yet, when the time of payment arrived, plaintiff protested that the bill had been charged to it, without authority, and that it was not liable therefor. The bill was in fact

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paid by the contractor before plaintiff filed its lien statement. In view of this situation, we are of the opinion that the trial court was fully justified in finding that the material furnished by the Nelson Company was not in fact or legal effect a part of that furnished by plaintiff, and in refusing plaintiff the right to tack that account to its own bill of material, thus enabling it to avoid the statute requiring lien statements to be filed within ninety days from the date of the last item.

Judgment affirmed.

JAGGARD and SIMPSON, JJ., took no part.

TOWN OF FARLEY v. TOWN OF BOXVILLE.[1]

January 13, 1911.

Nos. 16,821—(86).

County commissioners — extension of town boundary.

The board of county commissioners has no authority, in the absence of legislative grant of power, to extend the boundaries of a town organized by it beyond the boundary line of the county.

Same — authority of board.

Power to so extend the boundary is not granted by section 3, art. 11, of the state constitution, nor by section 914, G. S. 1894.

Congressional township in two counties — organization of town.

When a congressional township, divided by county lines, is organized by the board of commissioners of one of the counties in which the township is in part situated, the territory beyond the county line does not become a part of the town. As to that terrritory, the organization is unauthorized and of no effect.

Apportionment of bonded debt of town.

Chapter 273, Laws 1907, and chapter 492, Laws 1909, providing for the proportionate payment of the bonded indebtedness of towns which, after the issuance of the bonds, have been divided and organized into separate towns, have no application to the facts stated in the opinion.

[1]Reported in 129 N. W. 331.

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Action in the district court for Marshall county by the town of Farley in Polk county against the town of Boxville in Marshall county to recover defendant's proportionate share of the principal and interest of certain ten-year bonds aggregating $5,000 issued by plaintiff town on June 20, 1883, pursuant to Sp. Laws 1883, p. 277, c. 135, relating to township drainage in Marshall, Polk and other counties. The answer admitted the organization of defendant as a town, but alleged that section 1 of township 154 north of range 48 was incorporated in the city of Warren by Sp. Laws 1891, c. 44, and denied the other allegations. The case was tried before Grindeland, J., who dismissed the action at the close of plaintiff's case, upon the ground plaintiff had failed to establish a cause of action. From an order denying plaintiff's motion for a new trial, it appealed. Affirmed.

Brown & Eckstrom and *George S. Grimes,* for appellant.

Martin O'Brien and *Julius J. Olson,* for respondent.

Brown, J.

The facts in this case are as follows: The north boundary line of Polk county, as established by the act of the legislature creating it, extended due east seventy or more miles from the intersection of Turtle river with the Red River of the North; the same being one and one-half miles south of the town line between townships 154 and 155. All territory north of this line to Canada border was embraced within the then county of Pembina. The name of that county was subsequently changed to Kittson. Chapter 59, p. 114, Laws 1878. Polk county as thus established, was organized by chapter 98, p. 220, Laws 1873. The county of Marshall was established and organized by chapter 10, p. 24, Laws 1879, from territory immediately north of Polk and within the boundaries of Kittson county.

The south line of Marshall county extended easterly from the Red river on the line between townships 154 and 155. This was one and one-half miles north of the north line of Polk county, and left a strip of land between the two of one and one-half miles, not within either county. This territory was subsequently included within Marshall county by an act of the legislature. Chapter 81, p. 111,

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Laws 1883. In other words, the north line of Polk county as originally established was made the south line of Marshall county.

Prior to this, and when the territory mentioned was not a part of either county, the board of county commissioners of Polk county, upon petition duly presented, organized township 154, range 48, as the town of Farley. As so organized, the town extended beyond the borders of Polk county one and one-half miles, and included the territory mentioned, which was not then a part of the county. The town, however, proceeded with its business as an organized subdivision of Polk county, and has since remained an organized town. Some of the inhabitants thereof resided upon the strip of land not in either county, and others within the legal boundaries of Polk county.

In June, 1883, the town, as so organized, issued its bonds in the sum of $5,000 for the construction of roads and bridges therein. Two months after the issuance of the bonds, the territory between the two counties became, as already stated, a part of Marshall county. In March, 1884, on a petition duly presented for that purpose, the board of county commissioners of Marshall county organized that part of township 154, range 48, lying north of the Polk county line, and before the correction of the county line supposed to be a part of the town of Farley, as the town of Boxville, in Marshall county. Thereafter a part of this territory was detached from that town, and duly incorporated in and made a part of the city of Warren.

The town of Farley, having paid the bonds issued by it in 1883, brought this action against the town of Boxville, under the provisions of chapter 273, p. 368, Laws 1907 (R. L. Supp. 1909, §§ 787–1, 787–2), and chapter 492, p. 614, Laws 1909 (R. L. Supp. 1909, §§ 691–2, 691–3), to recover its proportionate share thereof, as fixed and defined by those statutes. The action was dismissed in the court below, and plaintiff appealed from an order denying a new trial.

It is conceded that defendant is not bound to contribute to the payment of the bonds, unless made liable by either one or both of the statutes referred to; in other words, that defendant's liability, if it exists, is wholly statutory, and unless so imposed no recovery can be had. We therefore turn our attention to the statutes relied upon.

1. Chapter 273, Laws 1907, is entitled "An act relating to the

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liability of towns and villages in cases where bonds have been heretofore issued, and the territory comprising the same has thereafter been divided," and provides that whenever, prior to its passage, any town in the state has issued its bonds for any lawful purpose, and the proceeds thereof have been used for the benefit of such town as then constituted, and such town has thereafter been divided into one or more additional towns or villages, and one of said towns or villages has paid the bonds so issued, the amount thereof shall be a valid and subsisting indebtedness against all such towns or villages, to be apportioned among them according to the rule therein prescribed. It is the contention of plaintiff that defendant is liable under this statute. In this we do not concur.

It is well settled that statutes creating obligations, where otherwise none exist, or those imposing new duties, should, if valid at all, be strictly construed, and treated as embracing such matters and situations only as come clearly within the scope and purpose of the legislation. 2 Sutherland, St. Const. (2d Ed.) 547–580; Peet v. City of East Grand Forks, 101 Minn. 523, 112 N. W. 1005.

The act of 1907 clearly does not cover a situation like that here presented. The act was intended to embrace within its scope legally organized towns and villages, whose territory was thereafter, in the organization of other towns or villages, divided and separated. There never was such a division of the town of Farley in the case at bar. The territory now forming the town of Boxville, though a part of the congressional township organized as Farley, never in legal contemplation became a part of that town. It was without the boundaries of Polk county, and the board of commissioners had no authority to incorporate or include it as a part of the town of Farley.

The state is divided into counties, the jurisdiction of which, in all matters committed to them by the legislature, is limited to the boundaries of each. No county can, in the absence of legislative grant of power, reach out its hand and assert authority over territory not within its boundaries, either in the organization of towns, school districts, or otherwise. This would seem too self-evident to require discussion or the citation of authority.

Counsel does not contend to the contrary; but he does insist that

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authority to include in the organization of a town territory beyond the boundaries of a county is conferred by the constitution and laws of the state. In support of this contention attention is called to section 3 of article 11, of the constitution of the state, and to section 914, G. S. 1894. The provisions of the constitution authorize the passage of laws for the organization of towns from congressional or fractional townships, and "when a township is divided by county lines, or does not contain one hundred inhabitants, it may be attached to one or more townships." If this may be said to authorize an extension of a town line beyond the limits of the county, it is a mere grant of power to the legislature, and is not self-executing. And, conceding such to be the effect, it is clear that the power granted has never been acted upon, or provision made for so extending town lines.

Section 914, G. S. 1894, does not so provide. That statute is a general grant of power to boards of county commissioners to organize towns and to fix and determine their boundaries. Only a forced and arbitrary construction of the statute would sanction an extension of the boundaries of towns organized beyond the limits of the county. The existence of a single town, partly in two separate counties, would involve the administration of public affairs therein in inextricable confusion, particularly in the matter of the levy and collection of taxes, and the holding of elections for state and county officers. This is so apparent and obvious that legislation authorizing such a town formation would necessarily provide fully for all such difficulties. None are provided for, and we are clear that no such organization was contemplated by the statute referred to.

Chapter 176, p. 294, Laws 1889, passed long after the conceded separation of the Boxville territory, has no application. If it can be said to have any application whatever, its force and effect would be the reunion of the territory, and this manifestly was not the intention. Our conclusion, therefore, upon this branch of the case, is that the Boxville territory was never a legal part of the town of Farley, and the act of 1907 does not apply. The question whether that territory was de facto a part of Farley is unimportant. The act of 1907 has reference to legally organized towns subsequently divided

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into other towns, and not to towns whose territorial limits had been extended beyond those authorized by law.

2. Chapter 492, p. 614, Laws 1909, comes nearer meeting a situation like that at bar, but in view of the rule of strict construction applicable to statutes of this character, we are of the opinion that it does not apply. That act provides that whenever any territory has heretofore been incorporated, or attempted to be incorporated, into a town, and as so incorporated has issued its bonds, and has thereafter been divided, or a part of the territory separated therefrom, by reason of the improper or unauthorized extension of the boundaries thereof into an adjoining county, the detached territory, if subsequently organized into a town, shall be liable for its proportionate share of the indebtedness represented by the bonds so issued by the original town. This imposes liability upon the detached territory only when, subsequent to the separation from the parent town, it has become incorporated "and is now exercising the powers, duties and functions of a town." [p. 615.] Only a part of the detached territory in the case at bar was included within an organized town at the time of the passage of the statute; the remainder thereof being within and a part of the city of Warren. This part, it is claimed, constitutes one-third in value of the taxable property in the whole territory when the bonds in question were issued. In view of this situation we are not justified in holding that the legislature intended to impose upon a part of the detached territory in cases of this kind the entire proportionate share of the indebtedness chargeable to the whole territory; and if the legislature be authorized to create a liability upon a claim so aged and apparently infirm as the one here involved, it should be declared in clear and explicit language.

The indebtedness was incurred in 1883, over twenty-five years ago, and whatever part thereof was expended while the Boxville territory was supposed to constitute a part of Farley was so expended within a period of about six weeks or two months; for at that time the correction of the county line completely separated the territory, and it was then no longer treated as a part of the town of Farley. We find it exceedingly difficult to determine the amount thereof. But, in view of the conclusion reached, it is unnecessary to do so.

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We hold, without further discussion, that it was not the intention of the legislature to impose, in cases of this kind, the entire proportionate share of the bonded indebtedness chargeable to detached territory upon a part thereof, and consequently that the act of 1909 has no application to a situation like that here presented. Nor can the court adjust the matter as between the territory within the city of Warren and that comprising the town of Boxville. The liability is statutory, and not one for the cognizance of a court of equity.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

PROVIDENCE JEWELRY COMPANY v. W. A. CROWE.[1]

January 13, 1911.

Nos. 16,823—(99).

Sale — fraud in procurement of signature.

Action to recover upon a written contract for goods sold and delivered. Defense, that the defendant's signature thereto was obtained by fraud. *Held* that, as between the original parties to a written instrument, a party whose signature thereto is obtained by fraud may avoid it, although he was lacking in ordinary business prudence in the premises; that the verdict for the defendant is sustained by the evidence; and that the trial judge did not abuse his discretion in denying a new trial on the ground of the misconduct of defendant's counsel.

After the former appeal, 108 Minn. 84 (121 N. W. 415) the case was tried in the district court for Lyon county before Olsen, J., who denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. Plaintiff's motion for judgment notwithstanding the verdict or for a new trial was denied. The misconduct of defendant's counsel alleged in plaintiff's motion,

[1] Reported in 129 N. W. 224.

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and referred to at the end of the opinion, was in using these words to the jury: "We have had crooks and thieves coming through this country and working their profession. We have had these lightning rod agents working their game through this country, and now there is another kind working their game. Mr. Crowe is not in the habit to be dealing with fakirs. Whenever he tells a man something he can rely on it." From an order denying its motion for judgment or for a new trial, plaintiff appealed. Affirmed.

Patterson & Hall, for appellant.

Gislason & Arntson and *Mathews & Lende,* for respondent.

START, C. J.

Action in the district court of the county of Lyon to recover $340.35 upon an alleged written contract for jewelry sold and delivered. Verdict for the defendant. The plaintiff appealed from an order denying its blended motion for judgment or a new trial. This is the second appeal in the case. See 108 Minn. 84, 121 N. W. 415, to which reference is here made for a sufficient statement of the allegations of the answer so far as here material.

The trial court on the second trial submitted to the jury two alleged defenses: (1) Whether the contract was obtained by fraud; and (2) whether the goods delivered under the alleged contract were shoddy jewelry and worthless—that is, whether they were of the kind and quality called for by the contract. No objection to submitting both of these defenses was made, nor any exception taken to the charge of the court, either before the jury retired or on the motion for a new trial. No exception to the charge of the court was taken at any time. The plaintiff did, however, move for a directed verdict, at the close of the evidence, which was denied, and exception taken. This ruling is here assigned as error, and presents the only serious question for our consideration. If, then, the evidence was sufficient to sustain a finding by the jury, either that the contract was obtained by fraud, as alleged in the answer, or that the goods were not of the kind and quality ordered, the plaintiff's motions for a directed verdict, and for judgment notwithstanding the verdict, were correctly denied.

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An examination of the record satisfies us that the evidence was sufficient to require the submission of the case to the jury. There was evidence tending to show that the written contract for the purchase of the goods was obtained from defendant by fraud of plaintiff's agent. It is true that the defendant was a business man, and could read, and that he signed the printed contract. The evidence, however, tends to show that the actual contract made by the parties was an oral one, whereby the plaintiff agreed to furnish the defendant, without cost to him, certain goods for advertising purposes, which were to be given by defendant to his customers as premiums; that after they had so agreed the defendant said he would accept the advertising proposition and sign the order; that thereupon the agent handed to him a printed instrument for his signature, and he signed it without reading it, or knowing whether it was in accordance with the oral contract. The instrument was not in fact an advertising proposition, but an elaborate and involved contract, containing an advertising plan, and also an order for the purchase of goods at the agreed price of $340.35. If the rights of third parties were here involved, the defendant's want of ordinary business prudence in signing the contract without reading it would present a serious obstacle to the maintenance of his defense.

However this may be, the fact remains that there are here no third or innocent parties. The presentation of the written contract by the plaintiff to the defendant for his signature was a representation that it was the same in effect as their oral contract as to the advertising scheme. The plaintiff knew that it was a false representation, for it had prepared the printed contract in advance. It is also apparent that the defendant relied upon this representation to his injury, and plaintiff cannot escape from the consequences of its fraud by asserting that the defendant ought not to have confided in its integrity; for as between the original parties to a written contract a party whose signature thereto is obtained by fraud may avoid it, although he was lacking in ordinary business prudence in the premises. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891; Providence Jewelry Co. v. Crowe, 108 Minn. 84, 121 N. W. 415.

We hold that the evidence was sufficient to sustain the verdict, and,

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further, that the trial judge did not abuse his discretion in denying a motion for a new trial on the ground of alleged misconduct on the part of the defendant's counsel in his argument to the jury. We are not, however, to be understood as approving of the remarks of counsel.

Order affirmed.

JAGGARD, J., took no part.

FRANK O. HAMMER v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 13, 1911.

Nos. 16,826—(186).

Decedent guilty of contributory negligence.

In an action to recover for the wrongful death of plaintiff's intestate, it is *held* that decedent was, as a matter of law, guilty of contributory negligence. Magliani v. Minnesota Transfer Ry. Co., 108 Minn. 148, followed and applied.

Action in the district court for Hennepin county by the administrator of the estate of Anton Olsen, deceased, to recover $5,000 for the death of his intestate. The answer specifically denied the plaintiff had suffered damage in any sum whatever by reason of any negligence on the part of the defendant. The action was tried before Hale, J., who directed a verdict in favor of defendant because the negligence of the deceased contributed to his death. From an order denying a new trial, plaintiff appealed. Affirmed.

Larrabee & Davies, for appellant.

Brown, Albert & Guesmer, for respondent.

BROWN, J.

Plaintiff's intestate was in the employ of defendant as a laborer in and about one of its switching yards at Minneapolis, described in

[1]Reported in 129 N. W. 219.

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the record as "yard C." His duties were to couple and uncouple the air hose connection between cars brought into the yard, and to oil cars requiring the same. He also assisted occasionally in starting a gasolene engine, which operated a pump at the water tank located in the yards. He was run over and killed by a switch engine, and plaintiff brought this action to recover therefor, alleging that decedent's death was caused by the negligence of those operating the switch engine in failing to give the customary and usual signals of its approach. The court below directed a verdict for defendant on the ground of decedent's contributory negligence. Plaintiff appealed from an order denying a new trial.

A careful consideration of the record leads to the conclusion that the trial court properly disposed of the case.

The yard in which decedent was employed was made up of numerous tracks, and switching of cars upon the same was continuously going on. Decedent was aware of this condition. He had been employed in the yards for three years. He came to his work on the morning of his death on a switch engine, and alighted therefrom at a switch shanty located at the junction of several yard tracks. After conversing a few moments with an employee at the shanty, he proceeded in the direction of the water tank, distant therefrom down the yard about five hundred feet. Between the shanty and the tank there was ample space between parallel tracks to enable one going in that direction to avoid danger from passing engines or cars. Several switch engines were moving about the yards at this time, and this to the knowledge of decedent. Yet he proceeded to the tank upon one of the tracks, instead of upon the space between them. A short distance from the shanty he stopped to light his pipe, and then walked on, and was overtaken by the switch engine and killed. He was not at the time absorbed in the performance of his duties. His attention was not diverted. On the contrary, he was proceeding leisurely to the tank, presumably to assist in starting the engine which operated the same; and, though the negligence of the switching crew in failing to give the usual signals of the approach of the engine be conceded, a question not entirely free from doubt, the conclusion of contributory negligence is the only one the facts pre-

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sented will justify. The case comes squarely within Magliani v. Minnesota Transfer Ry. Co., 108 Minn. 148, 121 N. W. 635.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

T. S. SLINGERLAND v. GEORGE CONN.[1]

January 13, 1911.

Nos. 16,848—(181).

Order establishing ditch — technical description.

The description of a ditch in drainage proceedings, as contained in the report of the engineer and order laying the same, need not be couched in such language that every layman may trace its location. It is sufficient, though described in part by technical words and recognized signs and abbreviations, if a competent civil engineer or surveyor may therefrom definitely locate the ditch upon the ground.

Same — no equitable action to correct irregularities.

The remedy for the correction of irregularities and defects in drainage proceedings is by direct attack, and parties to such proceedings cannot maintain an equitable action for that purpose.

Action in the district court for Dodge county to restrain defendant, the owner of a ditching or dredging machine and at work with it near certain land of plaintiff, from continuing the work and excavating any ditch upon and across that land, as he threatened to do. The answer set up the due laying out of a judicial ditch by the district court for that county, pursuant to Laws 1907, c. 448, the letting and execution of the contract for its construction to defendant, and his partial performance of the contract; and alleged that plaintiff

[1] Reported in 129 N. W. 376.

[Note] Procedure for establishment of drains and sewers, see note in 60 L.R.A. 161.

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was a party to the proceedings, appeared and was heard from time to time in the proceedings; that he had notice of the entry of the final decree, which confirmed the award of damages and benefits from such ditch, and made no objection thereto but acquiesced therein. The reply was a general denial. The action was tried before Buckham, J., who made findings and dismissed the action on the merits. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Norton & Norton and *Lord & Ronken,* for appellant.

Morgan & Meighen, for respondent.

BROWN, J.

Proceedings were duly commenced under the provisions of chapter 448, p. 641, Laws 1907, for the construction of a drainage ditch in Dodge county. The proceedings seem to have been in all things regular, and culminated in an order by the district court for the construction of the ditch; the same being designated as "Judicial Ditch No. 1, Dodge County." Notice of the hearing on the petition for the ditch was duly given, and the engineer appointed for the purpose made a detailed report, embodying therein maps and charts, showing the course, distance, and complete profile of the proposed improvement. A contract was subsequently let for the construction work, and the contractor entered upon the performance of the same. Thereafter plaintiff, who was served with notice of the proceedings, and who appeared on the first hearing of the petition and took part therein, and whose land was affected by the ditch, brought this action against the contractor to restrain and enjoin the work of construction. The grounds of the action are alleged defects in the drainage proceedings, and particularly that the termini of the ditch and its various courses and distances cannot be determined from the report of the engineer or the order of the court establishing the ditch, and therefore that the ditch proceedings are wholly void. Judgment was ordered for defendant, and plaintiff appealed from an order denying a new trial.

1. We are not required to consider the points made by plaintiff respecting the validity of the ditch proceedings; for it is clear, as

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urged by defendant, that the action cannot be maintained by plaintiff. We may remark, in passing, however, that technical nicety is not essential in describing the ditch in proceedings of this character. The description need not be couched in such language that every layman may trace it upon the ground. If it be so described, though in technical words and recognized signs and abbreviations, that any competent civil engineer or surveyor can accurately locate it, the requirement of definiteness and certainty is sufficiently complied with. Johnson v. County of Morrison, 107 Minn. 87, 119 N. W. 502, is wholly unlike the case at bar, and is not to be extended to the extent of embarrassing proceedings of this kind.

But the action cannot be maintained. Plaintiff was a party to the ditch proceedings, his lands were affected thereby, and the objections now urged against the validity thereof should have been presented in that proceeding, either by appeal or certiorari. State v. Johnson, 111 Minn. 255, 126 N. W. 1074. The question is fully discussed in the case cited, and requires no further mention. The result is that all objections to the validity of drainage proceedings must, as to parties to the proceedings, be determined therein, in default of which the order laying the ditch becomes final and free from collateral attack. Albrecht v. City of St. Paul, 47 Minn. 531, 50 N. W. 608; Fajder v. Village of Aitkin, 87 Minn. 445, 92 N. W. 332, 934; Schumacher v. Board of Co. Commrs. of Wright County, 97 Minn. 74, 105 N. W. 1125. The rule is otherwise as to those who are not parties to the proceedings and whose lands are not included therein. Bilsborrow v. Pierce, 101 Minn. 271, 112 N. W. 274. Nor does it apply to a case like Jurries v. Virgens, 104 Minn. 71, 116 N. W. 109, where long after the order laying the ditch a substantial departure is made in the construction thereof to the substantial damage of the property owner. The case of Johnson v. Town of Clontarf, 98 Minn. 281, 108 N. W. 521, was disposed of on the ground that the board of county commissioners, whose action in laying out a public highway was there involved, had no jurisdiction of the subject-matter, and is therefore not here in point.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

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WILLIAM J. PAINTER v. S. E. DAVIS.[1]

January 13, 1911.

Nos. 16,850—(198).

Bicycle struck by automobile — evidence.

The evidence was sufficient to justify the jury in finding that appellant was the owner of and an occupant of the automobile which collided with respondent. The trial court did not abuse its discretion in refusing to grant a new trial.

Action in the district court for Hennepin county to recover $7,000 for personal injuries caused by defendant negligently and unlawfully operating his automobile upon a city street in violation of the ordinances of Minneapolis. The answer was a general denial. The case was tried before Holt, J., and a jury which rendered a verdict for $500 in favor of plaintiff. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Keith, Evans, Thompson & Fairchild, for appellant.

Olof L. Bruce, for respondent.

Lewis, J.

On the twenty-fifth of May, 1909, respondent was riding a bicycle on the right-hand side of First Avenue South, between Eighth and Ninth streets, in the city of Minneapolis. He had just passed around the left side of a team ahead of him, and resumed his course on the right-hand side of the street, when an automobile came rapidly up from behind, came in contact with his wheel, and threw him over, causing the injuries complained of.

Respondent testified that, although stunned and injured, he got up sufficiently to see the automobile going on down the street, and read the number, 671, and noticed that it was a four-seated red car, without a top, and contained one person. The teamster, who witnessed the accident, testified that he saw the automobile come diag-

[1]Reported in 129 N. W. 368.

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onally across the street and run into respondent, throwing him over; that he also saw the number, 671, attached to the car, and noticed that the car was red and held but one person. Respondent, having ascertained that appellant was the owner of a car corresponding to the number and description of the one causing the accident, commenced this action against him for damages, and recovered a verdict for $500.

The only question before this court is the sufficiency of the evidence as to identification. Appellant was the owner of a four-seated open red car, such as described by respondent and the teamster. On the thirteenth of May, 1909, he had applied to the secretary of state for a number, and "671" was designated at that time as the number for his car. Appellant and his chauffeur both testified that the number was not received, nor put on the car, until after the date of the accident. Appellant admitted that he used the automobile during the morning of that day, but denied that he was on First Avenue South, and claimed that he never drove the car himself, but was always accompanied by his chauffeur, and some of his neighbors testified that they had never seen him drive the car himself. Both respondent and the teamster testified that the man in the car wore a cap and had gray hair, while appellant testified that he always wore a hat and never a cap. Respondent testified that the man in the car was large, had a round, full face, and that he thought he was the same man then in court.

That the machine causing the injury bore the number 671 is undisputed. Respondent made out a prima facie case by proving that number was designated for appellant's machine on the thirteenth of May, and whether the number was actually received by appellant and put on the machine after the twenty-fifth of May, or whether another machine with that number was the cause of the accident, were questions peculiarly for the trial court and jury. There was direct conflict in the evidence in some respects, although many of the differences may be accounted for on the ground of mistake, or inaccurate memory as to details. Appellant and his chauffeur may both be mistaken as to the date upon which he received and put the number on the car, and as to whether they were or were not on

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First Avenue South on that particular forenoon. Appellant's car may have run into respondent's bicycle without his knowledge, if his attention was not fixed on what was in front of him; and, conversely, respondent and the teamster may have been mistaken as to the number of people in the car. The question was apparently carefully considered by the trial court, and, although probable that appellant had no knowledge of the collision, yet it is not at all improbable that the accident was caused by his car.

The evidence does not manifestly preponderate against the verdict, and we discover no abuse of discretion in refusing to grant a new trial.

Affirmed.

SIMPSON, J., took no part.

JAGGARD, J., dissents.

GEORGE F. MERRITT v. HENRY G. HAAS and Another.[1]

January 13, 1911.

Nos. 16,851—(204).

Agreement not a guaranty.

An agreement construed to be an original promise, and not a guaranty.

Agreement to pay insurance premium — insolvency of insurer.

Where A. makes an agreement to pay the premium on a specified policy of insurance on the life of another, given as collateral security, such agreement assuming the continued existence of the insurance company issuing such policy and making no provision for the contingency of the company ceasing to do business, if thereafter such company becomes insolvent and ceases to do business, A. is thereby relieved from further performance of said agreement.

Reinsurance.

The fact that, prior to its insolvency, the company issuing the policy reinsured all its policy holders in another insurance company, does not so

[1] Reported in 129 N. W. 379.

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substitute the contract for insurance by the new company for the policy described in A.'s agreement as to require him to pay premiums to the new company.

Action in the district court for Ramsey county by the trustee of the trust estate of E. St. Julien Cox, under the last will and testament of William S. Cox, deceased, to recover $3,600. The complaint, among other matters, set out an order of that court directing a former trustee of that trust to pay over to plaintiff as his successor the sum of $9,037.16, and, in case of failure to make such payment, permitting plaintiff to sue upon his predecessor's bond, set out the agreement given in the opinion, and alleged that the four notes mentioned in that agreement, and interest thereon since the year 1905, were unpaid. The separate answer of defendant Haas alleged that all the pretended causes of action attempted to be set out in the complaint were barred by the statute of limitations, and that before the bringing of this action the plaintiff brought an action in the same court against these defendants upon part of the same contract, to-wit: an action to recover the interest upon the identical promissory notes described in the complaint, and that action was still pending. Defendant McCardy was not served with the summons and made no appearance. The case was tried before Hallam, J., who ordered judgment in favor of defendant Haas. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

I. C. Buell and *Durment, Moore & Sanborn,* for appellant.

John D. O'Brien and *Dillon J. O'Brien,* for respondent.

SIMPSON, J.

The facts in this case are substantially as follows:

One Albert Scheffer was trustee in possession of certain trust property. Defendants were sureties on his bond as such trustee. By order of the district court Scheffer was removed from his said trusteeship, George F. Merritt, plaintiff herein, was appointed in his stead, and Scheffer was directed to pay over to his successor a certain sum as part of the trust estate. Upon Scheffer's failure to pay the directed sum, the plaintiff herein sued him and his bonds-

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men, the defendants, to recover the same. During the pendency of that action it was settled; the court by its order authorizing and approving the settlement.

As part of such settlement Scheffer made to the plaintiff his four promissory notes, each in the sum of $900, and as collateral security to the payment of these notes and interest a policy of insurance upon the life of Scheffer payable to plaintiff was agreed to be, and was in fact, issued by the Northwestern Life Assurance Company; Scheffer and his bondsmen, Haas and McCardy, agreeing to pay all assessments and premiums on said policy. This agreement was as follows:

"The proposition made by Albert Scheffer, former trustee herein, and Joseph J. McCardy and Henry G. Haas, bondsmen of said trustee, which is on file in the above-entitled matter, having been approved by the court and accepted in full satisfaction and settlement of all claims and demands of George F. Merritt as substituted trustee herein against said Scheffer and his said bondsmen; and as security for the payment of the notes mentioned therein there has been reissued by Northwestern Life Assurance Company of Chicago, Illinois, that certain policy for the sum of ten thousand dollars on the life of said Albert Scheffer, payable to George F. Merritt, as trustee aforesaid, as his interest as such will appear, and the said policy has been delivered to said Merritt:

"Now, therefore, in part consideration for the release of us, and each of us, from all obligation imposed by the bond given in said matter by us, we and each of us do hereby guarantee to pay, as the same becomes due, all assessments and premiums upon said policy necessary to keep the same in full force and effect so long as any of the notes given by said Scheffer to said Merritt, as trustee, shall remain unpaid. And in case a five thousand dollar policy is substituted for said ten thousand dollar policy ($10,000), as contemplated in said proposition, we and each of us will make the payments of premiums on such substituted policy necessary to keep the same in full force during the time aforesaid.

"Dated December 4th, 1899.

[Signed] "Albert Scheffer.
[Signed] "J. J. McCardy.
[Signed] "Henry G. Haas."

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The policy of insurance therein referred to was issued and delivered to the plaintiff in December, 1899, or January, 1900. The annual premium prescribed by the policy was $498.90, payable February 6. No premium was ever paid on this policy, except the first annual premium mentioned therein. On September 1, 1900, a receiver was appointed for the said Northwestern Life Assurance Company, and from that time the said company was, and still is, insolvent and not in business. Albert Scheffer was insolvent at all times after November 1, 1900. The notes made by him to the plaintiff were not paid, and on September 29, 1905, Scheffer died. The provision for the substitution of a $5,000 "old line" policy was never acted on, and it does not appear whether or not such a policy could have been obtained.

Prior to September 1, 1900, the said Northwestern Life Assurance Company made a contract of reinsurance and transfer of its members, including the policy above mentioned, and the said Scheffer, to the Mutual Reserve Fund Life Association of New York, by the terms of which the said Mutual Reserve Association agreed to perform and carry out the obligations of the said Northwestern Life Assurance Company on its contracts or policies of insurance theretofore issued, including the policy of insurance hereinbefore mentioned, and said contract was fully approved and ratified by the members of the said Northwestern Life Assurance Company September 1, 1900, immediately prior to the appointment of a receiver for the company.

The Mutual Reserve Life Fund Association of New York was, at the time of this reinsurance, carrying on insurance under the assessment plan. In 1902 it changed its method to the old line system of insurance, this change involving a considerable increase in the amount of premium. In 1901 it was refused a license to do insurance business in the state of Minnesota, and never after was authorized to do such business in this state. It continued to do business, however, in New York and other places, until on or about February 22, 1908, when, it being insolvent, a receiver was appointed for it. It continued under said changed plan to carry the policies

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of insurance, issued by the Northwestern Life Assurance Company and reinsured by said Mutual Company, upon which premiums were paid until it went into the hands of a receiver.

Neither Henry G. Haas, defendant herein, nor George F. Merritt, plaintiff herein, had any notice or knowledge, until after the death of Albert Scheffer, of the insolvency of said Northwestern Life Assurance Company, of the reinsurance in the Mutual Reserve Fund Life Association, of the cessation of payment of premiums on account of said insurance after the said first premium, or of the lapsing and cancellation of the policy of insurance issued upon the life of Scheffer and delivered to the plaintiff.

Upon these facts the plaintiff claims the right to recover as damages the amount of the unpaid notes, to secure the payment of which the insurance policy was issued to plaintiff; such amount being less than the amount of the policy.

1. While the term "guarantee" is used in the agreement providing for payment by the defendants of premiums on the policy of insurance issued on the life of Scheffer, it fairly appears from an examination of all of the writings and circumstances of the settlement, as part of which this agreement was made, that the promise on the part of the defendants to pay the premiums was an original promise, and not a guaranty.

2. The agreement made by the defendants McCardy and Haas was to pay, as the same became due, all assessments and premiums upon said policy—that is, the certain contract of insurance for the sum of $10,000 reissued by the Northwestern Life Assurance Company —necessary to keep the same in full force and effect so long as any notes given by Scheffer to Merritt as trustee remained unpaid. It was not a general agreement to keep in force a fixed amount of insurance on the life of Scheffer.

When the Northwestern Life Assurance Company became insolvent, went into the hands of a receiver, and ceased to transact business, it ceased to earn premiums; and payment thereof was no longer required, and, if made, would not have been effective to keep in force insurance by that company on the life of Scheffer.

The parties to the agreement under consideration contemplated

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that the Northwestern Life Assurance Company would continue in business, and made no provision for the contingency of its going out of business. The agreement contemplated the continued existence of that particular contract of insurance, and thereby made the existence of that contract an implied condition of performance. The subject-matter of the agreement having ceased without any fault on the part of the defendant Haas, he is not liable for the resulting inability to further carry on the agreement. McMillan v. Fox, 90 Wis. 173, 62 N. W. 1052; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L.R.A. 113.

3. Payment of premiums to the Mutual Reserve Fund Life Association was not required by the defendants' contract after the reinsurance. The defendant Haas in no way agreed to recognize the insurance contract of the new company in lieu of the contract on which he had agreed to pay premiums.

The insolvency of the Northwestern Life Assurance Company and the assumption of its obligations by the Mutual Company created an entirely different contract of insurance from the one provided for in the guaranty agreement. Crowell v. N. W. Nat. Life Ins. Co., 99 Minn. 214, 108 N. W. 962; Lowell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. ed. 423.

A change in the insuring company is a very material change in the contract of insurance. The benefits accruing to the insured and the burdens imposed upon him might, by such change, be made greatly different, and in the present case it would seem that in both respects a substantial change was in fact made by the reinsurance.

If the premiums required by the Mutual Company had been paid, it might have been required to pay the amount of the policy on Scheffer's death; but this is because of its agreement so to do. Neither the plaintiff, Merritt, nor the defendant, Haas, was a party to that agreement, and neither was bound to accept and treat this policy as the equivalent of the one described in the guaranty agreement under consideration, and the present willingness of plaintiff to so accept and treat it cannot operate as an acceptance by the defendant Haas.

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It follows that the trial court rightly determined that there was no liability on the part of the defendant Haas in this action.

Affirmed.

JAGGARD, J., took no part.

LILLIAN McVAY v. MANNHEIMER BROTHERS.[1]

January 13, 1911.

Nos. 16,854—(177).

Safety of appliance.

The safety of an appliance or instrumentality may depend on its location and use. It may be a safe instrumentality under some circumstances, but unsafe under others.

Dangerous appliance.

The evidence was sufficient to justify the jury in finding that a metallic waste box, with a heavy adjustable door, was so located in appellant's store as to become a dangerous instrumentality when operated by an inexperienced or incompetent person, and that appellants were guilty of negligence in permitting an inexperienced and incompetent boy to operate the door, when located adjacent to a passageway through which other persons had the right to pass.

Action in the district court for Ramsey county against defendant corporation to recover $2,000 for personal injuries. The facts are stated in the opinion. The complaint alleged that when plaintiff approached the door to the engine room, the door of the box described in the opinion was open, and about three feet above her head, but plaintiff had no notice thereof or that the door was about to be closed. The answer admitted the employment of plaintiff but denied the other allegations of the complaint. The action was tried before Kelly, J., and a jury which rendered a verdict for $650 in favor

[1]Reported in 129 N. W. 371.

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of plaintiff. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Morton Barrows, for appellant.

James Schoonmaker, for respondent.

LEWIS, J.

Appellants were operating a department store in a five-story building in the city of St. Paul, and had constructed a sheet-iron box for the reception of waste paper, which was located in one of the basement rooms adjoining a door which opened from that room into the engine room. The dimensions of the box were seven feet and three inches long, four feet deep, and seven feet high. The front side was divided into two doors. The lower one, somewhat the larger, opened on hinges down to the floor; and the upper one opened upwards, and was held in place by two counterweights, weighing about fifty pounds, and the door itself weighed about forty-seven pounds. To enter the engine room, employees were required to stop at the entrance next to the waste paper box and ring a bell. Respondent, having been sent from an upper story to the engine room for some hot water, was standing about a foot from the entrance and awaiting the answer to the bell, when a boy employed to gather up waste paper reached up, caught hold of the open upper door, and pulled it suddenly down. It struck respondent on her head, and caused the injuries complained of. It was the duty of this boy, among other things, to clean up the waste paper and put it in the box. Just before respondent rang the bell, he had raised the upper door and deposited some waste in the box, but did not observe that respondent was near. The complaint charges that the box was negligently constructed, was an unsafe instrumentality, and that appellant had been guilty of negligence in permitting an incompetent boy to open and close it. The court submitted these issues to the jury, and a verdict was returned for respondent.

The question is: Is there any evidence to warrant the finding that appellants were guilty of negligence, or does it conclusively appear from the evidence that the accident was caused by the carelessness of a fellow servant?

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A sheet-iron box constructed in the manner stated is not necessarily, in itself, an unsafe instrumentality. It may be perfectly safe to use such a box, if located in a place where people having occasion to be in its vicinity would not be likely to come in contact with it. But when located in the proximity of a thoroughfare, where employees have a right to pass, then it may be an unsafe instrumentality, according to the manner in which it is operated. In the hands of a careful person, people who had occasion to pass in the vicinity would not be likely to be injured; but if operated by an inexperienced or incompetent person, lacking in judgment with regard to the safety of others, then it might be regarded as an unsafe instrumentality. We are of opinion that it was a question of fact whether a heavy lid, or door, of that kind, so arranged that it might be pulled down suddenly and strike a person having a right to be near it, was an unsafe instrumentality, and that it was also a question of fact whether appellants exercised due care in permitting an inexperienced boy to open and close the door, under such circumstances.

This case is distinguished from Vik v. Red Cliff Lumber Co., 99 Minn. 88, 108 N. W. 469, relied upon by appellant. In that case the master was not guilty of negligence in any respect. It appeared conclusively that the accident was caused by the negligence of the sawyer in failing to stop the gangsaw in time to prevent injury to the man on the opposite side, whose duty it was to remove the lumber. It was not shown that the sawyer was an incompetent person, or that the instrumentality was not a proper and safe appliance.

In the present case the facts are different. The boy had been employed in the store for about three months; his duties being to run errands and pick up waste material and put it in the box. He was not instructed in any particular as to how to manipulate the door of the box, and while, under ordinary circumstances, he would be perfectly qualified to gather up and dispose of waste matter, it is reasonably open to doubt whether such a person ought to have been permitted to operate a door of that kind, placed where it was, without proper instructions.

Affirmed.

JAGGARD and SIMPSON, JJ., took no part.

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MINNIE KLETSCHKA v. EMANUEL KLETSCHKA.[1]

January 13, 1911.

Nos. 16,869—(189).

Testatrix of unsound mind — undue influence.

The evidence justified the jury in finding that Mary Kletschka was of unsound mind and incapable of executing a will on February 17, 1907, and that she was unduly influenced to execute a will which devised property of the value of $35,000 to five daughters and one son, but excluded her son, Emanuel Kletschka, the contestant.

The will of Mary Kletschka, deceased, was presented by one of her daughters, Minnie Kletschka, to the probate court for Le Sueur county. Her son Emanuel Kletschka objected to its allowance. The will was allowed and the son appealed to the district court for that county. The appeal was heard by Morrison, J., who found that the will was null and void and ordered judgment for the contestant. From the order denying proponent's motion for a new trial, she appealed. Affirmed.

Francis Cadwell, M. R. Everett, and *S. B. Wilson,* for appellant.

Morgan & Meighen, and *P. McGovern,* for respondent.

Lewis, J.

For many years prior to 1900 Vincent and Mary Kletschka, husband and wife, resided in Le Sueur county, accumulated considerable property, and reared a family of seven children, five daughters and two sons. In 1900 the husband was adjudged insane and committed to the St. Peter state hospital, where he remained until the time of his death on February 1, 1907. From 1901 until February 9, 1904, the widow made her home with her son Emanuel, the contestant. From that time she lived, first, for a short time, with her daughter Mrs. Reddy, and then with her daughter Minnie, the proponent, until her death, August 22, 1908. On February 17, 1907, about two

[1]Reported in 129 N. W. 372.

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weeks after the death of her husband, the widow executed a will by which she bequeathed all of her property to the five daughters and her son Vincent, and with respect to her son Emanuel the will contained the following provision:

"Having heretofore at different times loaned to my son, Emil Kletschka, money which has never been repaid nor settled, and at other times paid out for him and at his request certain sums of money, I now cancel and release him from liability for the same, and which together with the bequest of one dollar, which I now make to my son Emil Kletschka shall be his share and only portion of my estate in accordance with my will and bequests herein made."

Immediately after the death of Mary Kletschka, appellant presented the will for probate, and the son Emanuel contested it upon the ground that his mother was of unsound mind at the time of its execution, and that she had been induced to make the will by undue influence. The will was allowed in the probate court. The contestant appealed, and the case was tried in the district court. The trial court found as follows:

"1. Said Mary Kletschka died at the village of Waterville, Le Sueur county, Minnesota, on the 22d day of August, 1908, leaving her surviving as heirs at law five daughters and two sons, viz.: Minnie Kletschka, the proponent, Victoria Reddy, Mary Shaw, Molly Kinslow, Julia Janish, Vincent Kletschka, and Emanuel Kletschka, the contestant, all of whom are living and of age."

"4. That at the time said instrument was executed, or purports to have been executed, the said Mary Kletschka, now deceased, was, by reason of old age, physical weakness, and loss and impairment of mental faculties, incapable of executing the same or making a valid will, and did not have or possess mental or legal capacity to make or execute said purported will, or any will or contract, and that the same was not and is not her will.

"5. That said purported will was not prepared by or under the direction of the said Mary Kletschka, now deceased, but was made and her signature thereto secured by the fraud, deceit, duress, and improper influence, unduly, illegally, and improperly exercised over said alleged testatrix by her said daughter, Minnie Kletschka, and

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others, at the time said instrument purports to have been signed, and said purported will was and is illegal, null, and void, and of no force and effect whatever."

Appellant argues that there was no evidence to sustain the finding that Mary Kletschka was of unsound mind, or that she was induced to execute the will by undue influence. The record discloses an unfortunate state of affairs in the family. From the time the father was committed to the asylum, appellant appears to have been in charge of the estate, not only of the father, but of the mother, and to have been the directing and controlling force. In 1901 one of the daughters made application to the probate court to have the mother committed to the insane asylum, but her efforts failed; and in 1902 another daughter made application to have a guardian appointed for her mother upon the ground that she was incompetent to care for her property. This application was opposed by other members of the family, and the probate court granted the petition, but upon appeal to the district court the order was reversed.

During 1907, after the execution of the will, while the mother was residing with appellant on the homestead in the village of Waterville, a contract was executed between appellant and the mother, by which appellant agreed to care for and provide for the mother for the rest of her natural life, and the mother deeded to appellant, by warranty deed, all of her real estate, with the exception of her homestead in the village, amounting approximately to more than $30,000 in value. This deed was subsequently set aside in an action brought in the district court.

At the time of her death in 1908 Mrs. Kletschka was seventy-three years old, and for a number of years had been in feeble health. More or less conflict was going on continually over the property and the control of the mother from 1900 to the time of her demise. Appellant claims that her mother was not comfortably housed and cared for during the time she lived with her son Emanuel, the contestant, from 1901 to 1904. There was a conflict in the evidence as to whether she voluntarily left Emanuel to reside with her daughters, or whether she was induced to do so by power of persuasion. The reason advanced by appellant for not providing for the contestant in the

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will in the same manner as for the other children was that he had already obtained loans and advances sufficient to equal his share, as stated in the will, and, further, that on account of the neglect and ill treatment, which appellant claims the mother received at his hands, she was fully justified in not providing for him to the same extent as the other children, even though he was not indebted to her in the amount stated.

The evidence was not conclusive that the contestant was indebted to his mother. On the contrary, there is evidence tending to show that the mother was indebted to him at the time of the execution of the will. While the failure to provide for the contestant does not raise a presumption that the mother was unduly influenced in executing the will, that fact is a circumstance which may be taken into consideration in connection with the other evidence in determining whether or not undue influence was exercised. In re Hess, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 665.

The evidence is quite convincing that the contestant and appellant were not, and had not for a long time been on friendly terms. There was a continual struggle over the control of the mother and the property. It was brought out in the evidence that appellant refused to admit her brother, the contestant, and his sons, into her house, and generally endeavored to prevent them from having communication with the mother. Contestant testified, corroborated by his two sons, that while living with him decedent always cried and grieved about the way her husband had been treated, claiming he had been abused by appellant and unjustly sent to the asylum. While the mother lived with appellant, two or three witnesses testified that she continually talked about her troubles, mourning because her children did not get along peaceably, and that she appeared childish and was incoherent in her talk. During the last three years of her life Mrs. Kletschka was kept secluded, and very few of the neighbors, or friends of the family, were called upon to testify as to her condition. The testimony offered by appellant to show that she was of sound mind and able to take care of herself was limited almost entirely to those having charge of her and to the attorney who for

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a number of years had transacted the business for appellant, and three of the daughters were not examined.

That Mary Kletschka was feeble and troubled, and at the mercy of her children and dependent on them in everything, is apparent, and the record furnishes ample proof that she was dominated by those immediately in charge of her. Appellant, and her brother Vincent, and sisters, had an interest in keeping contestant from participating in the property. Appellant, particularly, was in a position to exercise her influence, and the evidence is sufficient to sustain the jury in finding that it was exercised.

Affirmed.

SIMPSON, J., took no part.

EMMA HUFMAN v. CITY OF CROOKSTON and Another.[1]

January 13, 1911.

Nos. 16,898—(184).

Obstructing street — questions of fact — evidence.

In an action to recover for personal injuries, in which defendants were jointly charged with negligence in obstructing a public street, defendant bridge company in placing building material on and across a sidewalk, and the city, with knowledge of the fact, permitting the same, it is *held* that the evidence presented questions of fact, both with reference to the alleged negligence of defendants and the contributory negligence of plaintiff, and sufficiently supports the verdict.

Action in the district court for Polk county against defendant city and the Minneapolis Bridge & Iron Company to recover $5,000 for personal injuries. The complaint alleged that at the place of the accident the sidewalk had been broken and partially torn up by dragging and hauling heavy timbers and materials across the walk, which had caused the sidewalk to sink and become sagged and sloping, icy and slippery, by reason of which condition it was made

[1]Reported in 129 N. W. 219.

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dangerous for presons to walk along. The separate answer of the city alleged that plaintiff did not fall or slip because of any obstacle on the sidewalk, nor because of any defect in its construction or condition, but the slipping was caused wholly by a thin coating of smooth ice which covered the walk and was wholly the result of natural conditions, and was not caused by any act or neglect on the part of defendant city, and alleged that plaintiff was negligent and assumed all risks from traveling thereon. The separate answer of defendant bridge company was a general denial.

The case was tried before Watts, J., and a jury which returned a verdict for $860 in favor of plaintiff and against both defendants. The motion of defendant bridge company for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendants appealed separately. Affirmed.

Charles Loring, for appellant city of Crookston.

Bracelen & Cronin, for appellant Minneapolis Bridge & Iron Company.

R. J. Montague and *James E. Montague,* for respondent.

BROWN, J.

During the months of December, 1908, and January, 1909, defendant bridge company was engaged in the construction of a bridge across the Red Lake river at Crookston, under a contract with the city. In the performance of the work it occupied with material and its tools and implements a part of Robert street, near the south end of the bridge under construction. On January 5, 1909, a plank belonging to the bridge company and a part of the material for the bridge lay across the sidewalk on the north side of the street, and near the south end of the bridge, in such a manner that one end thereof lay upon and across the walk, and the other end upon the adjoining bank, about two feet higher than the walk. The evidence does not show how long this particular plank had remained in this position across the walk; but it does appear that the sidewalk at this point had been obstructed by the bridge company, to the knowledge of city officials, with planks and other building material, for a considerable time prior to the time plaintiff was injured.

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The street is much frequented by the citizens in going into the city and returning to their homes. The plaintiff resided in that portion of the city beyond the bridge operations, and in going into the business center of the city ordinarily passed along the street upon which the bridge construction work was in progress. In the afternoon of January 5, 1909, on returning to her home, she passed along the sidewalk over which the plank referred to was lying. In attempting to pass over the plank, she tripped and fell to the walk, receiving the injuries complained of. She could have passed over the walk on the opposite side of the street, upon which there were no obstructions. She testified, however, that she was unaware of the obstructions upon the walk at the point where injured.

She thereafter brought this action to recover for her injuries, charging the bridge company with negligence in obstructing the sidewalk with its building material, and particularly with the plank in question, and the city with negligence in permitting, with knowledge of the facts, the obstructions to be and remain thereon. Plaintiff had a verdict. Defendants separately moved for judgment notwithstanding the verdict, which was denied. Judgment was thereafter entered for plaintiff, and defendants appealed.

The only questions presented by the assignments of error are (1) whether evidence is sufficient to sustain the verdict of negligence against defendants, or either of them; and (2) whether plaintiff was as a matter of law guilty of contributory negligence.

It is the contention of counsel for the city that the presence of the plank across the walk was the sole cause of plaintiff's injury, that the city was in no manner responsible therefor, and, therefore, that a verdict should have been directed in its favor. It appears from the evidence that in the immediate vicinity of the plank there was a depression in the sidewalk, which was covered with snow; and it is the contention of counsel for the bridge company that this was the cause of plaintiff's injury, that the plank was in no way the cause of the accident, and, therefore, that a verdict should have been instructed in its favor.

A careful reading of the record leads to the conclusion that the question whether the accident was caused by the plank or the slippery condition of the depression in the sidewalk was one of fact, and

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that the evidence supports the conclusion that the obstruction created by the plank was the cause of the tripping and falling complained of. The evidence also supports the conclusion, as to plaintiff, that both defendants were responsible for the defect thus created. The plank was placed across the walk by the employees of the bridge company, and the city officials knew, some time prior to the accident, that the street and sidewalk at this point were being obstructed by that company. While the city authorities had no notice of the particular plank, they were informed of obstructions to travel in general, and made no effort to prevent the same. The question was for the jury. We are not concerned with the question of liability as between defendants. As to plaintiff, they were joint wrongdoers.

The evidence also made the question of plaintiff's contributory negligence one of fact. The cases of Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819, and Friday v. City of Moorhead, 84 Minn. 273, 87 N. W. 780, are not in point. In those cases it affirmatively appeared that plaintiffs therein well knew of the defects in the street over which they attempted to pass, and that there was another safe passage over the same or another street. Such knowledge does not appear in the case at bar—at least, not conclusively.

Judgment affirmed.

JAGGARD and SIMPSON, JJ., took no part.

JOSEPH E. DENNIS and Another v. JOSEPH S. FIRTH.[1]

January 13, 1911.

Nos. 16,908—(218).

Opening default judgment.

The trial judge did not abuse his discretion in vacating a default judgment against the defendant and permitting him to answer.

[1]Reported in 129 N. W. 387.

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Action in the district court for Hennepin county to recover $1,050 for breach of covenants in a conveyance of land from defendant to plaintiffs. The answer was stricken out as sham, and judgment for default of an answer was entered in favor of plaintiffs. From an order opening the default and granting defendant leave to answer, Hale, J., plaintiffs appealed. Affirmed.

C. H. Rossman, for appellants.

George B. Leonard, for respondent.

START, C. J.

Appeal from an order of the district court of the county of Hennepin vacating a default judgment and permitting the defendant to answer.

The action was begun June 3, 1910, for damages which the plaintiffs alleged they had sustained by a breach of the covenants of quiet enjoyment and warranty in a deed of the land described in the complaint, executed by defendant to plaintiffs. The defendant appeared and served an answer, which was stricken out as sham, and a stay of twenty days granted to enable him to make a motion for leave to amend his answer. He did nothing. The stay expired August 21, 1910, and on August 23 the plaintiffs applied to the court ex parte for, and obtained, an order for judgment on the pleadings for the full amount of damages claimed, and judgment was so entered on August 24. Five days thereafter the defendant obtained from the court an order on the plaintiffs to show cause why the judgment should not be vacated and he be permitted to serve his proposed answer, which stated a defense on the merits. On the return day of the order, September 1, the plaintiffs appeared and filed affidavits in opposition, and the trial court, after hearing the parties, made its order vacating the judgment and permitting the defendant to serve his amended answer.

The record presents only the question whether the trial judge abused his discretion in making the order appealed from. It is apparent from the record that the defendant put in a sham answer which tended to delay the action. On the other hand, after the ex parte judgment was taken against him, he acted promptly and ten-

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dered an answer on the merits. The trial judge was in a better position to determine the question of the defendant's good faith than this court. A consideration of the whole record has led us to the conclusion, with some hesitation, that the making of the order was not an abuse of discretion. We are, however, of the opinion that this is not a case in which statutory costs in this court should be allowed the defendant.

Order affirmed, without statutory costs.

JAGGARD, J., took no part.

STATE ex rel. A. N. BRIGGS and Others v. JAMES McILRAITH.[1]

January 13, 1911.

No. 16,932—(44).

Water, light and building commission — act of 1907.

The water, light, and building commission created by chapter 412, Laws 1907, for cities and villages containing a population of less than ten thousand inhabitants, has exclusive control of the village or city light or water plant, with authority to employ all help necessary to properly operate the same, to audit and allow all accounts for expenses incurred in the department, and to issue in the manner therein prescribed warrants on the treasury therefor.

Validity of warrants.

The approval or allowance of such accounts by the city or village council, or the signature of the mayor thereof to the warrants issued by the water commission, is not necessary to the validity of the same.

De facto clerk of city.

The city clerk, duly appointed and qualified as such, absconded from the state and abandoned his office. Thereafter the city council appointed a resident of the city "assistant city clerk," who thereafter qualified by taking the required oath, took possession of the office, and performed, with the co-

[1]Reported in 129 N. W. 377.

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operation of the city council and acquiescence of the public, all the duties pertaining thereto. It is *held*, though the appointment was unauthorized and irregular, that the person so appointed and acting was during his incumbency of the office de facto city clerk.

Expenses of water department.

In the absence of a showing of apportionment by the city council of the current expense fund created by section 88, c. 8, Laws 1895, among the several departments of the city, it is *held* that the expenses of the city water department are payable from the current expense fund.

Upon petition to the district court for Polk county by the members of the Water, Light, Power and Building Commission of the city of East Grand Forks, and Robert Braithewait, the court granted an alternative writ of mandamus directed to James McIlraith, as treasurer of that city, requiring him to pay to said Braithewait a certain warrant for $47.25, which had been issued by said commission and countersigned by the acting city clerk, or show cause why he had not done so. The matter was heard before Watts, J., who made findings and ordered a peremptory writ to issue. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

F. C. Massee and *A. A. Miller,* for appellant.

G. A. E. Finlayson and *Martin O'Brien,* for respondents.

Brown, J.,

Proceedings in mandamus to compel the treasurer of the city of East Grand Forks to pay a certain order or warrant drawn by the city water, light, and building commission. The trial court ordered judgment for a peremptory writ, and defendant appealed from an order denying a new trial.

The city of East Grand Forks was duly created and organized under the provisions of chapter 8, p. 16, Laws 1895, and contains a population of less than ten thousand inhabitants. On November 22, 1909, the city council thereof duly passed a resolution creating a water, light, and building commission, as authorized by chapter 412, p. 588, Laws 1907. By this resolution that statute became operative and in force in said city. The council duly commissioned relators

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Briggs, Craig, and Johnson members of the board so created, and they duly qualified and entered upon the discharge of their duties. They subsequently employed relator Braithewait, and he rendered certain services, work, and labor, in the water and light department, for which the commission duly allowed him the sum of $47.25 A warrant upon the city treasurer was issued for the payment thereof, signed by the president of the commission and by "Geo. K. Chambers, Asst. City Clerk." The respondent, city treasurer, refused to pay the warrant, for the reasons (1) that the claim had never been authorized or allowed by the city council; (2) that it was not signed by the city clerk; (3) that it was not signed by the mayor; and (4) that there was no money in the treasury in the fund upon which it was drawn. The trial court overruled all these objections, and affirmatively found that there was money in the treasury applicable to the payment of the order. The objections are all renewed in this court, the first two of which may be disposed of together.

1. The statute under which the commission was created (chapter 412, Laws 1907) grants to the members thereof "full, absolute, and exclusive control of and power over the water, light, and power plant or plants, and all parts, attachments and appurtenances thereto, * * * [with] power and authority to operate the same, * * * to do any and all things in and about the same * * * [and] to buy all material and employ all help which they deem necessary for a proper and economical operation" thereof. It also authorizes the members of the commission to fix all water and light rates to consumers and patrons, and to audit all claims against the department, and requires the village "recorder or clerk as the case may be, [to] draw his warrant upon the treasurer of said city or village for the amount allowed by said commission;" the same to be "countersigned by the president of the said commission."

There can be but one interpretation of this statute, and the intention of the legislature is clear. The purpose was to create a water and light commission in the class of cities and villages named in the act, and to clothe it with exclusive authority, acting by itself, and independently of the common council, or mayor, to operate, control, and manage a city water and light plant. This authority is expressed

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in clear and unambiguous language, and effectually creates a department of village or city government responsible only to the people. No revisory control is vested in the council or mayor, and contracts made by the commission within the limits of the authority granted are as valid and binding as though made by the city or village council. American Electric Co. v. City of Waseca, 102 Minn. 329, 113 N. W. 899.

It was therefore unnecessary that the city council approve or allow the claim involved in the case at bar. It was based upon a contract for services rendered the commission, and the audit and allowance by that body was all that was essential to its validity as a claim against the city. Nor was it necessary that the warrant for the claim be signed by the mayor. The statute does not require his signature; on the contrary, it provides that such warrants shall be signed by the city clerk, who by the statute is made clerk of the commission, and by the president of the commission. The provisions of the city charter upon the subject of the allowance of claims against the municipality and the payment thereof must be deemed, in so far as inconsistent with the statute in question, abrogated or repealed by implication.

2. The warrant was signed by "Geo. K. Chambers, Asst. City Clerk." It is the contention of defendant that Chambers was not authorized to sign the warrant, that he was not the city clerk, de facto or otherwise, and that the warrant was not legally authenticated. The facts in reference to this matter are that one Zimmerman was city clerk, having been duly appointed and qualified as such. On December 9, 1909, Zimmerman absconded from the state and abandoned the office, and ever since then his whereabouts have been unknown. On the sixteenth of December, 1909, the council appointed Chambers "assistant city clerk," and he duly qualified, by taking the oath of office, took possession of the office, and thereafter performed all the duties pertaining thereto.

It is probable that this appointment was unauthorized, and that Chambers did not thereby become a de jure officer. But his entering into possession of the office thereunder, and his continued discharge of

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the duties thereof, with the knowledge and co-operation of the city authorities and the public in general, made him a de facto officer, and as such his attestation of the warrant here in question was valid. It is not controlling that he designated his official title as "Assistant City Clerk." He was in possession of the office of city clerk, and discharging the duties thereof under color of appointment and with public assent, and was therefore de facto city clerk. Lodgord v. City of East Grand Forks, 105 Minn. 180, 117 N. W. 341; Fulton v. Town of Andrea, 70 Minn. 445, 73 N. W. 256; 29 Cyc. 1392.

3. We are of the opinion that the trial court was right in holding that the warrant in question was payable from the current fund of the city. Section 88 of the charter (Laws 1895, p. 41, c. 8) provides for a current expense fund, which is made up of all money paid into the treasury not assigned or set apart to some other specially created fund. Out of this fund, the statute provides, shall be paid all the salaries and expenses of the city government and the cost of operating all the departments thereof having no special fund created therefor. No special fund is by the charter created for the water and light department, and all money received from rents, fines, and dues in that department are required by section 91 [p. 42] to be credited to the current expense fund. Other special funds are created, but none for the water plant.

Section 91 does not so provide, but simply requires the accounts of the water department to be separately kept, the last clause of which requires the city council to set apart sufficient of the current expense fund to defray the expenses of the water department. The apportionment or setting apart is required to be made by the terms of section 88 prior to the tax levy and as a guide in the determination of the amount of the levy; and, if it may be said that this constitutes the creation of a separate fund for the use of the departments referred to, we discover no evidence in the record that the apportionment was ever made by the city council. Clearly, in the absence of the apportionment, the expenses of the water department are payable from the current expense fund. What the situation would be if such an ap-

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portionment of funds had been made and exhausted we need not determine.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

MAX EFRON and Another v. JOHN A. STEES.[1]

January 13, 1911.

Nos. 16,940—(191).

Express agreement modified by subsequent conduct of parties.

An express agreement controls to the exclusion of an implied agreement with reference to the same subject-matter; but the rule does not apply where the implied agreement is based upon the subsequent conduct of the parties, not covered by the express contract.

Tenant's rights as against landlord.

In a lease of a storeroom the lessor reserved the right of entry into the basement by means of the stairway in the rear of the room. Having subsequently occupied a part of the room for the storage of goods, the lessee, or his assignee, may maintain an action for the reasonable value thereof; the lease being silent upon the subject.

Action in the municipal court of St. Paul to recover $130 for the use and occupation of a certain room. The defense set up in the answer is stated in the opinion. The action was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiffs for $110. From an order denying a new trial, defendant appealed. Affirmed.

Harold Harris, for appellant.

A. J. Hertz, for respondents.

[1]Reported in 129 N. W. 374.

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LEWIS, J.

After alleging that respondents were copartners, doing business under the name of Morgan & Co., and that at a certain date they were in possession as lessees of certain premises in the city of St. Paul, viz., No. 167 East Seventh street, the complaint, as amended, states: "That on the 20th day of August, 1907, the defendant had hired from the plaintiff the rear room of said premises, and that the reasonable worth and value for the use and occupation of said rear room is the sum of five dollars, and that the defendant took possession and occupied said premises until the 20th day of October, 1909." As a defense, the answer alleged that on "February 13, 1907, defendant leased to one Philip Morgan and Benjamin F. Morgan, doing business under the firm name of Morgan & Company, the storeroom on the ground floor in that certain building known and designated as No. 167 East Seventh street, in the city of St. Paul, but reserved and excepted therefrom the rear entrance into said floor in said building and the stairway to the basement thereunder, and all rights and privileges necessary to the free and uninterrupted use of said rear entrance and stairway." The answer further alleged that by mutual consent and understanding appellant used a small portion of the rear end of the stairway in common with the lessees. The court found that appellant used and occupied a portion of the rear room for a period of twenty-two months, and that the reasonable value thereof was $110, and ordered judgment for that amount.

Objection was made to the introduction of any evidence, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground that the occupation of the premises by the landlord, who had previously rented the same to the tenant, did not constitute a basis for an implied contract to pay rent, and that respondents had mistaken their remedy. Appellant attempts to bring the case within the rule that, when an express agreement between parties remains in force and unperformed, a resort to an implied contract cannot be allowed; citing Tietz v. Tietz, 90 Wis. 66, 62 N. W. 939. In that case the plaintiff sued for a quantum meruit, but it appeared that the subject was controlled by the terms of a special contract, and the special con-

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tract controlled. For a similar case, see Bond v. Corbett, 2 Minn. 209 (248).

Such is the general rule, but it does not apply where the provisions of the express contract are not intended to control all subsequent conduct between the parties. The lessor acquired no more right to occupy the room in which the stairway was situated for storage purposes than to occupy the front room. The lease makes no provision for the occupancy found to have taken place, and appellant acquired no right to occupy the rear room, or any part of it, by reason of his right of access to the basement. That instrument furnishes no remedy for such occupancy, and hence an action will lie on the implied contract to pay the reasonable value. In this view of the case, it is immaterial that respondents, the present occupants, are not the parties named as lessees in the lease.

Affirmed.

SIMPSON, J., took no part.

STATE v. ED. SNYDER.[1]

January 13, 1911.

Nos. 16,950—(27).

Indictment — offense charged fixed by the facts alleged.

The offense charged in an indictment is determined by the facts alleged, and not necessarily by the offense designated by name. Rule applied to an indictment which states facts constituting grand larceny in the first degree, but which designates the offense as grand larceny in the second degree.

Same — evidence.

Under an indictment which states facts constituting grand larceny in the first degree, although designating the offense as in the second degree, the accused may be found guilty in the second degree, if the evidence warrants.

Construction of verdict.

In determining the meaning of the verdict in a criminal case, reference may be made to the evidence and record as well as to the indictment. The

[1] Reported in 129 N. W. 375.

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accused was on trial under an indictment which declared the offense to be grand larceny in the second degree, and the jury returned a verdict that he was "guilty in manner and form as charged in the indictment." The verdict was not ambiguous, and, when considered in connection with the evidence and the record, was a conviction of grand larceny in the second degree.

Charge to the jury.

The evidence justified the trial court in charging the jury that the accused could be found guilty in the second degree only.

Errors favorable to the accused unavailable.

Errors favorable to the accused are unavailable. Appellant was not prejudiced by the statement of the trial court to the jury that the indictment charged him with the offense of grand larceny in the second degree.

Defendant was indicted in the district court for Cottonwood county for stealing and carrying away in the nighttime from a granary building certain skins of the value of $38. He was tried before P. E. Brown, J., and a jury which returned a verdict of "guilty in manner and form as charged in the indictment" of the offense of grand larceny in the second degree. The subsequent proceedings are narrated in the third paragraph of the opinion. From the judgment entered pursuant to the sentence, and from the order denying motions to set aside the judgment, or to grant a new trial, defendant appealed. Affirmed.

N. L. Glover and *J. G. Redding,* for appellant.

George T. Simpson, Attorney General, and *O. J. Finstad,* County Attorney, for the State.

Lewis, J.

Subdivision 2, § 5081, R. L. 1905, provides that a person who steals or unlawfully obtains or appropriates the property of another of the value of more than $25, by taking the same in the nighttime from any building, is guilty of grand larceny in the first degree, and the punishment is imprisonment in the state prison for not less than one nor more than ten years. When the value of the property is less than $25, it is grand larceny in the second degree, and the punishment is imprisonment in the state prison for not more than

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five years, or by imprisonment in the county jail for not exceeding one year, or by a fine of not more than $500.

The indictment accused appellant "of the crime of grand larceny in the second degree, committed as follows." The property taken consisted of certain rat, skunk, and mink skins, and the indictment stated the value thereof to be $38.05. The court instructed the jury that appellant was charged by the indictment with the offense of grand larceny in the second degree, and that if he was guilty of any offense it was grand larceny in the second degree. The jury returned the following verdict: "We, the jury, impaneled and sworn to try the guilt or innocence of the above-named defendant, find the above-named defendant, Ed. Snyder, guilty in manner and form as charged in the indictment of the offense of grand larceny in the second degree."

A motion in arrest of judgment was made upon the ground, first, that the indictment charged larceny in the first degree; second, upon the ground that the evidence proved the commission of the crime of grand larceny in the first degree, if anything, and that there was no evidence in support of the crime of larceny in the second degree. The motion was overruled, and the court pronounced the following sentence: "You, Ed. Snyder, stand convicted by verdict of the offense of grand larceny in the second degree as charged in the indictment, and upon said conviction it is now considered by the court that you are guilty of said offense, and as punishment therefor it is further considered by the court, and the sentence and judgment of the court is, that you, Ed. Snyder, be confined at hard labor in our state prison at the city of Stillwater in this state for the term of three years." Judgment was entered, and a motion was then made to set it aside, and, if that motion be denied, that the court vacate and set aside the verdict and grant a new trial. Both motions were denied, and the accused appealed from the judgment and from the order.

The statute requires that an indictment shall contain a statement of the facts constituting the offense in ordinary and concise language, without repetition. The facts stated constitute the crime of larceny in the first degree, and the designation of the offense as larceny in

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the second degree was not controlling and a harmless error. The trial and conviction of appellant of grand larceny in the second degree did not constitute a variance, for section 5371, R. L. 1905, authorized conviction of the lesser degree. Appellant might have been found guilty of either offense under this indictment, according to the evidence as to the value of the property.

The property specified in the indictment consisted of thirty-two rat skins, four skunk skins, and one mink skin, of the total value of $38.05. The evidence, as it appears in the bill of exceptions, shows that the value of the property taken was less than $25, and the court was justified in instructing the jury that the only offense of which appellant could be convicted was grand larceny in the second degree. Having so instructed the jury, the verdict must be considered with reference to the instructions and the evidence. The words "in manner and form as charged in the indictment" do not necessarily refer to the value of the property as stated. The form of verdict was prepared by the court. The jury were clearly informed that the accused could be found guilty in the second degree only. The evidence warranted conviction in that degree alone. No one was misled, the result was for the benefit of the accused, and no objection was made to its form.

We are clear that the verdict was not ambiguous, and that appellant understood he was convicted of larceny in the second degree. "There is no set form of words in which a verdict is required to be rendered, and therefore the only rational general rule that can be adopted is: Does it show clearly and without any doubt the intention of the jury and their finding on the issues submitted to them? If it does, it cannot be declared bad, without sacrificing substance and justice to form." Dunnell, Minn. Pr. § 2340.

A verdict is sufficient, if by reference to the pleadings and record it can be made certain. Cohues v. Finholt, 101 Minn. 180, 112 N. W. 12. Errors favorable to the defendant are unavailable. State v. Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. 776.

Affirmed.

SIMPSON, J., took no part.

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M. E. RUTHERFORD and Another v. THOMAS J. YORKS.[1]

January 20, 1911.

Nos. 16,827—(207).

Organization of county.

An act providing for the organization of Kanabec county by its terms was not to take effect until adopted by the electors of Pine county. *Held*, the evidence submitted upon the trial did not sustain the finding that the county was duly organized thereunder prior to September, 1859.

Action in the district court for Kanabec county to determine adverse claims to certain land. The answer alleged that defendant was the owner in fee of the same. The reply denied the allegations of the answer, and alleged that defendant had failed for more than twenty years to pay taxes on the land, and if he ever had any interest therein he had long since abandoned it; that plaintiffs purchased the land in the year 1900 and have since acquired all the rights of the state in and to the land. The case was tried before Stolberg, J., who made findings and ordered judgment in favor of plaintiff North Star Land Company. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

C. Henningsen, for appellant.

Daniel Fish, for respondents.

Simpson, J.

This is an action brought to determine adverse claims to one hundred twenty acres of vacant land in Kanabec county. At one time the territory comprised in Kanabec county was part of Pine county. Plaintiff and defendant each bases his claim to the land upon title derived from Simon P. Snyder, the original patentee. September 1, 1859, Snyder conveyed the land in question to one Gebhart. This deed was recorded in Pine county September 15, 1859. In 1871

[1]Reported in 129 N. W. 386.

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Gebhart conveyed to defendant and one Spencer by deed recorded in Kanabec county in 1882. Defendant thereafter acquired Spencer's interest. November 27, 1899, Snyder sold and conveyed the land in question to the plaintiff, and its deed was recorded in Kanabec county December 6, 1900.

Upon the trial of the action two principal questions were raised: (1) Was the record of the deed from Snyder to Gebhart constructive notice to plaintiff of this conveyance? (2) Did the plaintiff purchase the land in good faith, for value, and without notice of the prior conveyance? Upon each of these questions the trial court found adversely to defendant, and determined that the plaintiff is the owner of the land in question. By several assignments of error the correctness of these findings is here for review.

As stated, the earlier deed, under which the defendant claims title, was recorded in Pine county, which county had been organized prior to 1858, and, when organized, included within its limits the land in question. Such record in Pine county gave constructive notice of the contents of this deed, unless Kanabec county was an organized county prior to September, 1859. An act of the territorial legislature, passed March 13, 1858 [Sp. Laws 1858, p. 166, c. 56], established Kanabec county and provided for its organization. After naming and defining the boundaries of the new county—these being the requisite provisions for establishing a county—this act designates the county seat and authorizes the Governor to "appoint three suitable persons who shall constitute a board of county commissioners for said county, who shall hold their offices until the next general election, or until their successors are duly elected and qualified; and the said board of commissioners shall have power to appoint all other officers in and for said county."

A register of deeds was one of the county officers under the then existing law in organized counties, and when this act went into effect it would create the office of register of deeds in Kanabec county, and authorize commissioners appointed by the Governor to name an officer to fill the position. The authority here given is the same as that given in an act organizing Toombs county, and in Thomas v. Hanson, 59 Minn. 274, 61 N. W. 135, it was held that the act not

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only established Toombs county, but organized it as well, and thereby created the office of register of deeds. But by the terms of the act providing for the organization of Kanabec county it was not to take effect until its adoption by a majority of the electors of Pine county at the next general election. This distinguishes in an important respect this act from the Toombs county act. The question still remains, therefore, whether the act ever went into effect.

Upon the trial no evidence was offered of any adoption of the act by the electors of Pine county, or of any document issued by the Governor appointing commissioners thereunder, unless the taking of these steps may be inferred from other facts shown at the trial. There was introduced in evidence the minutes of a meeting contained in the minute book of the county commissioners of Kanabec county, showing, together with the transaction of other business, that "the commissioners appointed by the Governor" held a meeting in the township of Brunswick, appointed a chairman of the board of county commissioners, and appointed J. C. Morrison, register of deeds, and directed him to proceed to St. Paul to procure books for his office. The deed and mortgage record books in the office of the register of deeds of Kanabec county were introduced in evidence, showing the first deed recorded therein of date October 3, 1859, and subsequent records of instruments, the dates of such subsequent records not appearing; also the 1861 report of the State Auditor, showing taxable property reported from Kanabec county, together with organized counties of the state.

While the facts shown are consistent with plaintiffs' claim that the act of March 13, 1858, went into effect and was acted upon, and an organization effected thereunder, on the other hand, other public acts wholly failed to recognize such organization. Chapter 87 of the Laws of 1881, Special Session [p. 86] is entitled "An act to provide for the organization of the county of Kanabec." Section 1 provides "that the county of Kanabec as now established by law in this state be, and the same is hereby declared to be, an organized county, with all the rights, privileges and immunities of other organized counties within this state." Other official acts on the part of the executive and legislative departments of the state likewise failed to recognize

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or treat Kanabec county as an organized county after the time here involved. We are of opinion that this evidence was not sufficient to sustain the finding of the trial court that Kanabec county was, during or prior to September, 1859, an organized county.

The court can, and does, take notice that Kanabec county is now, and for a long time has been, an organized county of this state. Under what circumstances a court will take notice of the exact time of the organization of a county is a subject on which the authorities differ. Buckinghouse v. Gregg, 19 Ind. 401; Trimble v. Edwards, 84 Tex. 497, 19 S. W. 772. But in this case, under any rule, the court cannot take notice that the time of the organization of Kanabec county was prior to September, 1859, for our attention is called to no record or source of information, beyond the evidence offered, showing such to be the fact.

Unless the existence of Kanabec county as an organized county de jure at the time in question is established by evidence, the proof fails. There is clearly no organization or existence as a de facto county shown prior to or during September, 1859. A single partial exercise of corporate function does not create a de facto county. Further, it does not appear that at this time Pine county had ceased to exercise its corporate functions within the territory comprised in Kanabec county, or that the customary and generally recognized place for recording conveyances of land situated in Kanabec county was not in the register of deeds' office in and for Pine county.

As a new trial must be directed upon the grounds discussed, it is unnecessary to consider the questions raised by the other assignments of error.

Order reversed.

JAGGARD, J., took no part.

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JULIUS HOPPE v. CITY OF WINONA and Another.[1]

January 20, 1911.

Nos. 16,832—(192).

Death from electric discharge — liability of city.

The city of Winona, under authority of congress and of the legislatures of Wisconsin and Minnesota, constructed a bridge across the Mississippi river, from the Minnesota to the Wisconsin side thereof, and thereafter operated it as a toll bridge. By an ordinance duly enacted the city authorized defendant power company to string its electric wires over and attach the same to the framework of the bridge for the transmission of electricity from its plant in Wisconsin to and the distribution thereof in the city of Winona. The city reserved the right to control the manner in which the wires were so strung, and directions in that respect were given by the ordinance. The wires so placed upon the bridge carry from twenty-five thousand to forty-five thousand voltage of electricity, and at times throw off a "brush" or "disruptive discharge" sufficient to cause the death of a person in close proximity therewith, without actual contact with the wire. The city thereafter let a contract for painting the bridge, and decedent was in the employ of the contractor in doing the work. He was killed while so at work by a "brush" or "disruptive discharge" of electricity from the wires. It is *held:*

1. That if the wires were negligently strung upon the bridge, by reason of the fact that they were uninsulated, and not sufficiently elevated upon supports above the structure, to avoid persons coming in contact therewith while at work upon the bridge, both the city and the power company are liable.

2. Whether there was negligence in this respect was, on the evidence, a question of fact, and the verdict of the jury is sustained.

3. That the relation of the city to the bridge was that of private owner of a quasi public highway, and its grant of authority to the power company to string its wires thereon was an exercise of its municipal and not of its governmental functions.

4. The dangers from a "brush discharge" of electricity from the wire were unknown to the contractor or decedent, and both were entitled to warning thereof from the city.

5. The doctrine of independent contractor has no application to the case.

[1]Reported in 129 N. W. 577.

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6. The question of decedent's contributory negligence was a question of fact for the jury.

Action in the district court for Winona county by the administrator of the estate of Ernest Lampe against the city of Winona and the La Crosse Water Power Company to recover $5,000 for the death of his intestate. The facts are stated in the opinion.

The complaint alleged, among other things, that the wires were capable of conveying a very powerful current of electricity, were not insulated, were negligently attached to short steel towers or brackets fastened to the top of the bridge, and were so carelessly and negligently strung that at one point they passed within three or four feet of the top cross girder, and one wire within eighteen or twenty inches of the inside edge of one beam on the top of the bridge; that the wires so strung were negligently maintained on and along the top of the bridge and were negligently permitted by the defendant city to be so maintained, and on the day of the accident the defendant power company negligently permitted the wires to be charged with a heavy current of electricity, and the defendant city negligently permitted the wires to be so charged; that while decedent was astride of the beam nearly opposite the point where the wires sagged and hung over the top cross girder of the bridge, and when in the act of straightening his body, suddenly and without warning a current of electricity from the wires passed through his body, enveloping it in flames and smoke, and causing his body to fall into the river; that at the time of the accident the wires were charged with a heavy current of electricity exceeding forty thousand voltage. The separate answer of defendant city alleged that the work of painting the bridge was done under contract and defendant did not exercise any control or authority over the contractor or his servants. The separate answer of defendant power company, except for the formal admissions, was a general denial.

The case was tried before Snow, J., and a jury which returned a verdict in favor of plaintiff for the sum demanded. From the order denying defendants' separate motions for judgment notwithstanding the verdict or for a new trial, they appealed separately. Affirmed as to both defendants.

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Webber & Lees, for appellant La Crosse Water Power Company. *R. A. Randall* and *Brown, Abbott & Somsen,* for appellant city. *Buck & Fitzpatrick,* for respondent.

BROWN, J.

By an act of congress approved September 25, 1890 (26 St. 470), an act of the legislature of the state of Wisconsin (Laws Wis. 1880, p. 314, c. 274), and Sp. Laws Minn. 1891, p. 742, c. 113, the city of Winona was authorized to construct and maintain a wagon bridge across the Mississippi river from the city to the Wisconsin side of the stream. Pursuant to this authority the bridge was constructed and since maintained by the city. Defendant La Crosse Water Power Company owns and operates a power plant on the Wisconsin side of the river, developing therefrom electricity and conveying the same by means of electric wires to the city of Winona. In 1907 the city council, by ordinance duly enacted, granted authority to and permitted the power company to string its said wires over and attach the same to the bridge. The ordinance required that the wires should be attached to high voltage insulators, and be strung from the frames of angle iron to be attached to the topmost girders of the bridge. The wires were so strung about fifty feet above the traveled portion of the bridge and in no way interfered with the use of the same. They were of copper, three-eighths of an inch in diameter, and not insulated. At one point upon the Wisconsin side of the channel of the river the wires were so strung that by reason of the long distance between the supports they sagged and came within three feet of a crossbar of the bridge, and extending parallel with the same a distance of fifteen inches of the top girder, so that it was three feet above and fifteen inches from the side of the girder.

It became necessary in 1909 to make certain repairs upon the bridge, and a contract was let by the city to one Hoppe to paint the iron work of the entire structure. Hoppe employed plaintiff's intestate, who, while upon the iron girder at the top of the bridge, and at the point where the electric wires sagged to within three feet of the same, received a "brush" or "disruptive discharge" of elec-

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tricity therefrom, without coming in actual contact therewith, and was killed. Plaintiff thereafter brought this action, charging the power company with negligently placing the wire upon the bridge, uninsulated, and not at a sufficient height from the top thereof to avoid injury to workmen upon the bridge, the city with permitting the same, and defendant city with a failure to warn and instruct decedent of the dangers incident to a "brush discharge" of electricity. Defendants put in issue the negligence charged, and alleged that decedent came to his death by reason of his own contributory negligence. Plaintiff had a verdict, and defendants separately appealed from an order denying their independent motions for judgment notwithstanding the verdict or a new trial. The assignments of error present questions peculiar to each defendant. We dispose of the question presented by the power company first.

1. It appears that the wires were strung upon the bridge pursuant to authority granted by the city in the form of an ordinance enacted for that purpose, which ordinance specified the manner and condition in which they should be strung. In fact, the ordinance required that the work be done under supervision of the city engineer. The trial court instructed the jury that, if there was negligence in the manner in which the wires were attached to the bridge, directing particular attention to the place where decedent met his death, both defendants were liable. It is the contention of the power company that the evidence wholly fails to make a case of negligence in this respect, and, therefore, that a verdict should have been directed for both defendants. In this we do not concur. The question was, on the evidence, one of fact for the jury.

There is and can be no controversy concerning the principles of law applicable to the case.

The power company was unquestionably under legal obligations, in placing the wires upon the bridge, to exercise care commensurate with the dangerous character of the instrumentality, and to adopt such methods as were reasonably practicable to avoid endangering those who might be employed upon or otherwise making legitimate use of the structure as a thoroughfare. Gilbert v. Duluth General Ele. Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430; Musolf v.

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Duluth Edison Ele. Co., 108 Minn. 369, 122 N. W. 499, 24 L.R.A. (N.S.) 451. The wires in question carried from twenty-five thousand to forty-five thousand voltage of electricity, and were not insulated or otherwise protected from contact by persons working upon the bridge. It appears that uninsulated wires so heavily charged throw off at times a "brush" or "disruptive discharge" of electricity sufficient to cause the death of a person in close proximity thereto, without actual contact with the wire. This fact is well known to electricians and those familiar with this generally unknown, powerful, and destructive agency.

The power company was bound to take knowledge of the fact that it would become necessary from time to time to make repairs upon the bridge, particularly in painting the same, to prevent deterioration and decay from exposure to the elements, and in placing the wires thereon precaution should have been taken for the safety of those thus engaged. Byerly v. Consolidated Co., 130 Mo. App. 593, 109 S. W. 1065. If the placing of the wires upon the bridge in the manner stated was an act of negligence, and likely to result in injury in some form, it is immaterial that defendant could not reasonably have anticipated injury in the manner disclosed in the case at bar. Christianson v. Chicago, St. P. M. & O. Ry. Co., 67 Minn. 94, 69 N. W. 640. But, as stated, the law of the case is not disputed. Defendant's contention is that its full duty in the premises has been discharged.

It is claimed that the evidence is conclusive that it was impracticable to insulate the wires; that, if insulated, the elements would destroy the same and render the wires of greater danger; and, further, that they could not have been elevated higher at the point in question without imposing an additional strain upon the bridge and imperiling its strength; hence that the court should have directed a verdict in defendants' favor. This argument is not of substantial force.

It must be conceded, since the jury so found, that in the condition in which the wires were strung they were dangerous to the life and safety of those at work upon the bridge. There was no imperative necessity that they should be strung at this place, and the reason

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for doing so would seem to have been one of economy in the distribution of electricity developed by defendant at its plant. Defendant had no vested right in the use of the bridge for that purpose, and, though granted by the city council, the right should have been exercised with due regard to the safety of those engaged in the vicinity of the wires, and, if their safety could not be provided for, a probable injury guarded against by reasonable precautions, the right should not have been exercised at all, and other methods of transmitting the electricity to Winona adopted and resorted to.

Defendants offered considerable evidence tending to show that the manner of stringing the wires over the bridge involved a consideration of many technical facts and conditions, cognizable only by experts, and of which laymen could not intelligently judge, from which it is urged that the opinion of the experts that the wires were properly placed is conclusive. This contention is not sound. The experts, in giving their testimony to the effect that the wires were strung in the only practicable manner, had in mind, not the protection of third persons from possible injury, but the safety of the bridge, and the fact that additional supports would increase the strain upon that structure, and therefore were impracticable. For reasons already suggested, this furnishes no sufficient excuse. If the bridge was of insufficient strength to support the wires with proper supports, it should not have been adopted as a means of reaching Winona with the wires.

2. The assignments of error challenging rulings of the court in the admission and exclusion of evidence, and in its charge to the jury, require no extended discussion. We have examined them all, and discover no reversible error. The complaint alleged that wires in the condition of those in question would throw off a "brush discharge" of electricity. This was supported by evidence at the trial in connection with other evidence of a "disruptive discharge," and complaint is made because the court permitted the jury to determine whether decedent's death was caused by either. In this there was no prejudicial error. It would seem of no particular importance by what name the escaping electricity was known. Defendant was informed by the complaint of the fact that a discharge of electricity

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from the wire caused decedent's death, and this was sufficient to admit of the evidence characterizing it either as a brush or disruptive discharge. The complaint also alleged that the wires were not insulated, and, as remarked by the trial court, the allegations thereof, fairly construed, charged negligence in stringing them over the bridge in that condition.

There were no errors in the instructions of the court to the jury. The charge was full and complete, and gave to the jury the correct rules of law applicable to the case. The points made support in the main the contention that issues not presented by a strict construction of the complaint were submitted to the jury. The complaint was entitled to a liberal construction, and there was no such departure therefrom as to justify a reversal.

The question whether decedent was entitled to instructions concerning the dangers incident to a brush or other discharge of electricity was properly submitted to the jury, as well as the question of his contributory negligence. No evidence was presented that decedent was familiar with the action of electricity under conditions like those here disclosed, and in view of the fact that his work took him near the wires he was entitled to proper warning of the dangers incurred. The evidence made the question whether decedent was at the particular point upon the bridge contrary to instructions, and whether he was in the exercise of due care for his safety while there, questions of fact for the jury, and we discover no reason for disturbing their conclusion.

The appeal by the city presents questions respecting its liability which do not involve the power company. These questions will be disposed of in the order presented in the brief of counsel for the city.

The bridge was constructed across the river under authority granted to the city by the federal congress and the legislatures of the states of Wisconsin and Minnesota. Both legislative acts provided that the bridge, when so constructed, might, at the election of the city council, be operated and maintained without cost to the traveling public, or as a toll bridge. The Wisconsin act prescribed a maximum charge, if the city council determined to operate it for hire. No question is made respecting the authority of the city to

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construct and maintain the bridge, and no controversy arises as to its ownership of the structure, and its power and duty to keep and maintain it in suitable repair for the uses intended by its construction. Nor is it questioned that authority was granted the power company by the city council to string its electric wires over and attach the same to the frame work of the bridge. The city council determined to operate the structure as a toll bridge, and it has exacted a charge from persons making use thereof. It is also undisputed that the city entered into a contract with one Hoppe for painting the bridge, and that decedent was in the employ of the contractor, and engaged in the performance of this contract, at the time of his death. The contentions of the city are that:

(1) In passing the ordinance in question, and thereby permitting the wires to be strung and maintained upon the bridge, the city was (if not acting wholly ultra vires, so as to be in any way liable) in the exercise of a public or political, and not a private or corporate, function, and as a legislative body, in a semijudicial capacity, and in a matter involving governmental policy and discretion.

(2) That Hoppe, the employer of deceased, was the city's independent contractor, and the rule of respondeat superior had no application as between the city and the contractor's servants; and

(3) That, if the city owed the contractor's servants any duty respecting notice and warning of dangers from coming in proximity with the wires, that duty was fully discharged.

1. The determination of the first question depends largely upon the relation of the city to the bridge and its maintenance. If the construction and control thereof was an exercise of its governmental powers, as distinguished from its municipal or proprietary affairs, then it is quite probable that its management, including the act granting permission to string the wires thereon, would also be governmental or legislative, for an exercise of which no action lies. But, if its relation to the bridge involves its business or proprietary capacity, the ordinance granting the privilege to the power company would partake of the same character.

It is clear that the bridge was the private property of the city, and held, owned, and maintained in its proprietary capacity. It

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was not constructed with reference to a street or highway laid out or established by public authority, and was not open to the free and unrestricted use of the public. Travel thereon was limited to those who paid the prescribed toll, receipts from which went into the city treasury. The city was under legal obligations to keep and maintain the bridge in suitable repair for the use of those paying for the privilege, precisely as municipalities owning and maintaining public wharves, landings, and docks for hire are required to maintain them in safe condition for use. 28 Cyc. 1309, and cases cited. And there can be no serious question but that it would be liable, for damages sustained for a failure to exercise reasonable care in this respect, to the same extent as though the bridge was owned and operated by an individual. City v. Hudson, 94 Ga. 135, 21 S. E. 289; 1 Thompson, Negligence, 813.

The case of Becker v. City, 99 Wis. 414, 75 N. W. 84, 40 L.R.A. 829, 67 Am. St. 874, involving liability for neglect in the maintenance of a similar bridge at La Crosse, is not an authority to the contrary. The defect involved in that case was an improper construction of the approaches to the bridge, extending a distance of two miles over and across the river bottom on the Minnesota side of the stream. The Wisconsin court held that, while the bridge was constructed under proper authority, the city of La Crosse had no power to extend its jurisdiction into Minnesota and make itself responsible for the highway over the bottom land adjacent to the river in that state. The act of the legislature of Minnesota granting authority to the city of La Crosse to construct and maintain that bridge provided that the city should be responsible for accidents and injuries resulting from its failure to maintain the structure in proper condition for use. Had the accident there complained of been caused by a defect in the bridge itself, though happening upon the Minnesota side of the river, the Wisconsin court would undoubtedly have held the city liable. In other words, the court would have held that, in accepting the grant from this state, it also as a matter of law accepted and assumed the conditions attached to it.

And again, though the bridge be treated as the private property of the city, it is in all essential respects a public thoroughfare, and

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the liability respecting its control and management must be measured and determined according to the principles of law applicable to the care and maintenance of public streets and other public grounds. The bridge answered every purpose of a public way. It was constructed to enable the public to pass to and from the state of Wisconsin, and in no essential respect differs from a public bridge along and upon a highway wholly within the boundaries of the city. It is well settled that, when a municipality authorizes a third person to place upon its public streets agencies of a character likely to endanger the traveling public, even though the privilege granted be beyond its authority, liability arises upon injury to a person lawfully upon the street who is free from fault. City of Winona v. Botzet (C. C. A.) 169 Fed. 321; Stanley v. City, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216; City v. Smith, 101 Va. 161, 43 S. E. 345; Landau v. New York City, 180 N. Y. 48, 105 Am. St. 709, and cases cited in note; 28 Cyc. 1354. The liability in this respect is limited by some of the courts to those cases where the municipality retains control over the time, place, and manner in which the agency is placed in the streets. It is founded on entirely different principles from cases involving negligent maintenance of property to which the public have no right to resort for business or other purposes, where no duty or obligation to exercise care for their protection is imposed by law.

We shall not attempt to mark the line between governmental and municipal functions. The former concern the administration of the law by an agency of the state government; the latter, the internal affairs of the municipality. And whether the bridge and its maintenance be construed as a private enterprise entered upon by special legislative authority, or as a quasi public highway, it is clear that the governmental functions of the city are in no way involved therein, and that the control of the bridge springs from its municipal or proprietary powers. From which it logically follows that the right granted the power company to string its wires thereon was not an exercise of governmental functions. Snider v. City of St. Paul, 51 Minn. 466, 472, 53 N. W. 763, 18 L.R.A. 151.

2. The contention that Hoppe, to whom the city let the contract

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to paint the bridge, was an independent contractor, does not seem to be involved in the action. The thing causing the death of decedent was not the result of any act or omission on the part of the contractor, but the joint act of the power company in stringing the wires upon the bridge and that of the city in permitting it. Had the contractor's negligence been the cause of the death of decedent, then the liability of the city could well be questioned. But such was not the case. The evidence is clear that the contractor failed in no duty to warn decedent of the likelihood of danger of a brush discharge of electricity from the wires, for he was in total ignorance of that fact. The danger from this source, though present, was concealed and beyond the knowledge of the contractor or his servants, and the duty of making it known was upon the city. Smith v. Twin City Rapid Transit Co., 102 Minn. 4, 112 N. W. 1001; Hagen v. Schleuter, 236 Ill. 467, 86 N. E. 112, 22 L.R.A.(N.S.) 856. The question whether defendant city was negligent in this respect was properly submitted to the jury. It is probable that as to all dangers incident to the presence of the wires, known and understood by the contractor, the city could not be held responsible. In such case the contractor would perhaps alone be liable for injury to his servants. Engel v. Eureka, 137 N. Y. 100, 104, 32 N. E. 1052, 33 Am. St. 692.

This covers all questions requiring special mention. The issues of fact involved in the action were properly sent to the jury, and the record presents no reversible errors.

Order affirmed as to both defendants.

JAGGARD and SIMPSON, JJ., took no part.

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CHARLES A. TULLER and Others v. LUCIAN SWIFT and Another.[1]

January 20, 1911.

Nos. 16,852, 16,853—(130, 131).

Sale of stock in lump — right of minority stockholders to an accounting.

H. owned the majority of the stock of a corporation. S. and M. were also owners of the stock. In 1901 H., S., and M. made a so-called tripartite agreement, by which each agreed not to dispose of any shares of the stock without first offering them in writing to the other two stockholders on the same terms offered by a third person. H. died, and in July, 1908, his executors executed an option contract, by which the tripartite agreement was annulled, and S. and M. secured an option to buy the shares belonging to the estate at the price of $300 per share, provided the option was exercised before September 1, and the sale was not made later than October 15, 1908. The sum of $150,000 was to be paid in cash and $570,000 in deferred payments as specified. August 21 four of the six plaintiffs assigned their shares of stock to S. and M. for $300 per share, to be paid on or before September 10, or, in default, the shares to be reassigned to their owners; and the other two plaintiffs gave S. a power of attorney to sell their stock. S. and M. executed a written contract with J. to sell and deliver the four thousand shares of stock in the corporation on or before August 31, the purchasers to pay one million dollars in cash, and the vendors to take all the cash assets and bills and accounts receivable on August 31, and pay all the indebtedness of the corporation accrued on that day, and hold the purchasers harmless by reason of any lawsuits pending or accruing on or before that day. This contract was performed, the executors delivered their twenty-four hundred shares of stock direct to J., and received the sum of $720,000 therefor, upon a prior understanding with S. and M. that the sum of $45,000 should be returned to S. and M. in consideration of the executors being paid all in cash, and also the $100 consideration paid for the option contract. Later H. paid S. and M. $45,100.

The six plaintiffs, who were either owners of stock or had the right to purchase certain shares, were paid at the rate of $300 per share, and in February, 1909, brought this action against S. and M. to set aside the assignment of stock and the power of attorney mentioned above, so far as those instruments may be claimed to give S. and M. any interest as pur-

[1]Reported in 129 N. W. 572, 130 N. W. 848.

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chasers of the stock described, and for an accounting of the $45,000 received by the defendants and of the amount collected out of the corporation assets taken by the defendants. *Held:*

1. The evidence sustained the finding that the defendants were acting in a fiduciary capacity, that they secured the $45,000 without the knowledge of plaintiffs and appropriated that amount to their own use, and that they must account for it to plaintiffs.

2. The evidence and the facts found overcame any presumption that the H. stock was to be equally divided between plaintiffs and defendants, and warranted the court in making the inference that it was understood that the stock, when obtained, should be divided pro rata, according to their prior holdings of stock, by plaintiffs and defendants.

3. The trial court erred in allowing the plaintiffs to share in the assets.

Action in the district court for Hennepin county by Charles A. Tuller, Winthrop B. Chamberlain, William A. Frisbie, William H. Webster, William McK. Barbour and George B. Bickelhaupt against Lucian Swift and John S. McLain. The complaint set out the facts stated in the first four paragraphs of the opinion, and further alleged that plaintiffs and defendants agreed to negotiate jointly with the executors of E. B. Haskell for the purchase of his shares of stock in the Journal Printing Company, jointly if possible; that defendant McLain represented to the executors that he was acting for the plaintiffs and the defendants, which representations the executors believed, and in reliance upon them the executors entered into the option mentioned in the second paragraph of the opinion; that after the execution of such option defendants assured plaintiffs that they would hold the option and assert all rights under it for the joint benefit of plaintiffs and defendants; that on or about August 6, 1908, defendants conspired together to appropriate to themselves all profits that might be realized on the Haskell shares by virtue of such contract, and deprive the plaintiffs of any share therein, also to appropriate to themselves to the exclusion of the other stockholders all profits that might be realized by a sale of all the stock and the termination of the company's contracts with plaintiffs Barbour and Bickelhaupt, and for the purpose of carrying such conspiracy into effect secretly negotiated the sale of all the stock to the Messrs. Jones, accepted in writing the offer made in the contract with the executors,

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and obtained from the four plaintiffs the assignment of their stock mentioned in the second paragraph of the opinion, and from the other two plaintiffs the power of attorney to sell their stock mentioned in the third paragraph of the opinion. It alleged that the four plaintiffs received payment for their shares of stock in ignorance of the fact that defendants had sold the Haskell stock at a profit of $45,000, and alleged that the power of attorney and assignment of their stock was obtained from plaintiffs for the purpose of concealing from them the amount realized from the sale of all the stock and the profits on the Haskell shares. The complaint prayed for the cancellation of the contract of the four plaintiffs to convey and assign their stock to defendants for $300 a share, for the cancellation of the power of attorney so far as it gave defendant Swift any right save that of representing plaintiffs Barbour and Bickelhaupt in a sale of their stock, and for an accounting of defendants' profits on the sale of the stock not belonging to them personally, such accounting to include their profit of $45,000, and for a determination of the amounts to which plaintiffs were entitled respectively, and for judgment for such amounts.

The answer, in addition to what is stated in the opinion on page 271, infra, set out the substance of the so-called "tripartite agreement" of 1901, and alleged that after the death of E. B. Haskell, his executors opened negotiations with defendants to give them an option for the purchase of stock in lieu of, and as a substitute for, that agreement, and would give no option unless upon condition that such earlier agreement was cancelled; that plaintiffs were not parties to that agreement or interested in the negotiations, and were not parties to or interested in the option contract; it set out verbatim the written contract of sale to the Messrs. Jones, under which defendants were to receive certain assets of the Journal Company and were to pay all indebtedness of the company existing on August 31, 1908, and undertook to indemnify the purchasers on account of any pending law suits and claims against it. The answer alleged that the net amount to be realized from said assets fell considerably short of the amount sufficient to pay plaintiffs $300 per share for their stock, and in view of the deficiency defendants negotiated with the Haskell

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executors for the purchase of the Haskell stock for cash at a less price than that named in the option, and the executors agreed to accept $675,000 in cash, but required defendants first to accept the option, and as a reason stated that they had given an option on the property contingent on defendant's failure to accept the option mentioned in the complaint; that defendants accepted the option and made an offer to the executors to pay $675,000 cash for the Haskell stock, which offer was accepted by the executors. The answer further alleged that at a meeting of the board of directors of the company on August 27, 1908, at which defendants and plaintiffs Tuller and Chamberlain were present as members of the board, the company by the board of directors, with the plaintiffs' consent, authorized the execution by the Journal Company of the proposed instruments to carry out the terms and conditions of the contract with the Messrs. Jones, and in pursuance of such authority the company by an instrument of assignment on August 31, 1908, attested by plaintiff Tuller as secretary, duly assigned to defendants all the assets mentioned in the contract, and by an instrument, attested by the same plaintiff as secretary and by plaintiff Chamberlain, undertook to carry out the agreement contained in the contract with the Messrs. Jones; that, after the execution of the contract with the Messrs. Jones, defendants notified plaintiffs of the execution thereof and of the terms thereof; that thereupon plaintiffs executed and delivered to defendants the contract for the sale of their stock and the power of attorney.

The reply alleged that on August 27, 1908, defendants had prepared a draft of the proposed minutes of a meeting of the board of directors of the Journal Company, and a draft of the proposed bill of sale from the company to the defendants, and a draft of a proposed contract between the printing company and the defendants, and defendants then requested said Tuller to attest said proposed bill of sale and said proposed contract, and requested Tuller and Chamberlain to attest by their initials said proposed contract, and relying on the representations of defendants and having no knowledge of the proposed sale, except as alleged, Tuller attested the bill of sale and the contract as secretary of the company, and Tuller and Chamberlain attested by their initials the proposed contract.

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The case was tried before John Day Smith, J., who found the facts substantially as stated in the first four paragraphs of the opinion and in the allegations of the complaint mentioned above; and also found that the sale and transfer to the Messrs. Jones were made in the absence of the plaintiffs except Tuller; and to conceal from him as well as from the other plaintiffs that they were receiving profits on the Haskell stock, defendants paid to the executors $720,000, pursuant to an agreement that the executors should refund $45,000 of the money so paid over, together with the $100 on account of the cash payment made to the executors at the time of the execution of the option contract, and thereby make the real price of the Haskell stock $675,000; that defendants concealed from plaintiffs, except Tuller, their negotiations with the executors for the reduction of the contract price, concealed from the plaintiffs that any reduction was obtained, and concealed from the plaintiffs the arrangement to have the $45,100 refunded; that plaintiffs except Tuller had no knowledge that the executors were to refund, or had refunded said sum, until about November 1, 1908. As conclusions of law the court found that plaintiffs acquired a joint interest with defendants under the option, and the rights in the Haskell shares under it were held by defendants in trust for the joint benefit of plaintiffs and defendants; that the respective shares of plaintiffs and defendants in the twenty-four hundred shares and in any profits on them, were as follows: Defendant Swift ½; defendant McLain 3/16; plaintiff Tuller 1/16, and each of the other plaintiffs 1/20; that as between plaintiffs and defendants the sale of the stock to the Messrs. Jones was voidable at the election of the plaintiffs; that the Messrs. Jones were innocent purchasers and their title was not attacked in this action; that as between plaintiffs and defendants plaintiffs were entitled to have the sale, and all documents procured by the defendants from the plaintiffs to effect the sale, adjudged null and void; that the plaintiffs were entitled to an accounting from the defendants for all money and property received as consideration for the sale to the Messrs. Jones; and ordered judgment against defendants for the sum of $12,953.75; that a receiver should be appointed, who was named in the findings, and that he should pay to the defendants and

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the plaintiffs in the proportions named above the amount which might be realized by him from all the assets of the Journal Printing Company received by defendants upon the sale to the Messrs. Jones.

Defendants appealed from the order denying their motion for a new trial. Plaintiffs appealed from an order denying their motion to amend the findings of fact and conclusions of law, and from a subsequent order denying their motion for a new trial. Modified.

Lind, Ueland & Jerome, for plaintiffs.

Cohen, Atwater & Shaw, for defendants.

Lewis, J.

The Journal Printing Company is a corporation, and owned, printed, and published the Minneapolis Journal, at the city of Minneapolis, for more than twenty-five years. The capital stock was $200,000, divided into four thousand shares of $50 each; and twenty-four hundred shares were owned by E. B. Haskell, of Boston, Massachusetts, until the time of his death, which occurred in 1907. Until August 31, 1908, defendant Swift owned eight hundred shares and defendant McLain three hundred shares. Plaintiff Tuller owned one hundred shares, and plaintiffs Chamberlain, Frisbie, and Webster owned eighty shares each. The remaining one hundred sixty shares were held in trust by defendant Swift, eighty shares for the printing company and plaintiff Barbour, and eighty shares for the company and plaintiff Bickelhaupt, under certain contracts of purchase by them. All of the parties had been employed by the company for many years—defendant Swift as general manager, defendant McLain as editor, plaintiff Chamberlain as managing editor, Frisbie as city editor, and Tuller as business manager. Barbour was manager of the advertising department, Bickelhaupt manager of the circulation and subscription department, and Webster manager of the mechanical department. The company's business prospered, and on August 31, 1908, the value of the stock was $300 per share.

July 29, 1908, defendants Swift and McLain secured an option for the purchase of the twenty-four hundred shares owned by the executors of the Haskell estate at $300 per share, $150,000 to be paid in cash on or before October 15, 1908, and $570,000 in deferred

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payments, payable annually from 1910 to 1926, with interest at five per cent., to be secured by the deposit of twenty-four hundred shares of stock, with a provision for the release of a certain percentage of stock upon the payment of stipulated amounts. There was also a provision in the option contract that the executors would accept in payment five per cent. bonds for the face value of the deferred payments outstanding, secured by a first mortgage upon all of the property of the Journal Printing Company. August 21, 1908, plaintiffs Frisbie, Chamberlain, Webster, and Tuller assigned all of their stock to the defendants, upon the condition that the defendants pay them $300 per share for the same on or before September 10, 1908, and in case the purchase was made the defendants were authorized to pay the executors of the Haskell estate any amounts that might remain due on the stock.

August 22, 1908, defendants Swift and McLain entered into a contract with Herschel V. and William S. Jones, whereby defendants agreed to cause to be sold and transferred to Messrs. Jones all the capital stock of the Journal Printing Company, including the Associated Press membership standing in the name of Mr. Swift, to be delivered at such place in the city of Chicago as the purchasers should designate on or before August 31, 1908. The purchasers agreed, as part consideration, to pay the sum of one million dollars in cash, $10,000 of which was paid at the time of the execution of the contract, and the remainder to be paid on or before August 31, 1908, upon delivery of the stock. The contract also contained provisions whereby the vendors reserved the assets of the company, with certain exceptions, including cash on hand and bills receivable, and assumed the obligations. The vendors also agreed to indemnify the purchasers from and on account of any pending lawsuits or claims against the company which might be made prior to the date of delivery. August 27, 1908, plaintiffs Barbour and Bickelhaupt executed a power of attorney whereby they authorized and empowered defendant Swift to sell the shares of stock which he held in trust for them to such person or persons and upon such terms as to him should seem meet, and authorized him to assign and deliver to the purchaser the

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certificates of stock, ratifying and confirming each and every act of Mr. Swift in regard to such sale and transfer.

On August 27, 1908, a meeting of the board of directors of the company was held, and the directors authorized the execution of the proper instruments to carry into effect the terms and conditions of the contract with Messrs. Jones. On August 31, 1908, at the city of Chicago, the defendants transferred and delivered to Herschel V. and William S. Jones all of the stock of the Journal Company, the defendants reserving the assets and cash on hand, and Messrs. Jones paid to the defendants the sum of one million dollars in cash, except the sum of $10,000, which had already been paid. In making the transfer of the stock, defendants procured the executors to transfer and deliver direct to the Joneses the twenty-four hundred shares of stock referred to in the option contract. At the time of the transfer of the Haskell stock, the executors were paid the sum of $720,000 in cash; but such amount was paid with the understanding between defendants and the executors that the sum of $45,000, together with $100, which had been paid as the consideration of the option contract, should be repaid as a consideration for receiving all cash. In pursuance of such arrangement the sum of $45,100 was refunded and paid to the defendants by such executors on September 10, 1908. From the balance of the money received from Messrs. Jones, defendants paid, on September 2, 1908, to plaintiffs Tuller, Chamberlain, Frisbie, and Webster at the rate of $300 per share for the stock owned by each of them, and to the plaintiffs Barbour and Bickelhaupt the amounts which they were to receive under their contracts above referred to. Defendants took possession of the cash on hand and other assets, which had been reserved by them, and proceeded to collect the accounts.

This action was commenced February 28, 1909, for the purpose of setting aside the assignment which had been executed by plaintiffs Tuller, Chamberlain, Frisbie, and Webster to defendants Swift and McLain, and the power of attorney which had been executed by plaintiffs Barbour and Bickelhaupt, authorizing defendant Swift to sell and transfer their stock, and for an accounting of the $45,100 received as a discount from the Haskell executors, and of the amount

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received and collected by defendants out of the assets reserved. The theory of the complaint is that defendants were representing, not only themselves, but all of the plaintiffs, in negotiating for and securing the option contract from the executors of the Haskell estate, and the $45,000 should be distributed per capita among the six plaintiffs and the two defendants; that is to say, an undivided one-eighth to each. Plaintiffs also claim that it was their understanding that the purchase price at which the entire capital stock was to be sold to the Joneses was $300 a share for four thousand shares, amounting to $1,200,000; that without their knowledge or acquiescence the defendants made a contract with Messrs. Jones whereby they received only $1,000,000 in cash, and the assets in lieu of $200,000 in cash; that, having profited by this deal, plaintiffs are entitled to an accounting for the amount so received.

The answer denied that plaintiffs had any interest in the Haskell stock, and alleged that the $45,100 refunded was obtained from the executors of the Haskell estate in consideration of paying cash for the stock, instead of deferred payments, as provided by the option contract. And the answer denied that plaintiffs had any interest in the assets which had been reserved by the defendants; that the Joneses could raise only one million dollars in cash, and in order to make a sale it was necessary for the defendants to assume the obligations against the company, and to reserve the assets specified, and to assume certain obligations, and that plaintiffs had accepted the amount paid to them in full settlement, according to agreement.

1. The trial court found that the option contract with the executors was procured by the defendants with the understanding that it would be held for the joint benefit and use of all the plaintiffs and defendants. Defendants insist that this finding is not sustained by the evidence, and refer to a previous contract, known as the "tripartite agreement," and insist that the option contract was executed in consideration of its cancellation.

The tripartite agreement was executed in October, 1901, by the defendants and E. B. Haskell, and was to the effect that neither one of the parties to the agreement would dispose of any of his shares of stock in the company then or thereafter owned by him without first

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offering such shares in writing to the other two stockholders on the same terms as offered him in good faith by any other person. The Haskell executors recognized this agreement as binding upon them, and insisted upon its cancellation as a consideration for the option contract. This tripartite agreement was undoubtedly of value to the defendants, because it gave them the opportunity of preventing the transfer of the majority of the stock to an outside party. It is true that the plaintiffs had no interest in this tripartite agreement, and defendants may have been in a position to deal independently for the stock without reference to the plaintiffs. But we are satisfied that, from the beginning of the negotiations with the executors until they culminated in the execution of the contract, it was the intention of the defendants to waive whatever rights they possessed under the tripartite agreement, and to secure control of the Haskell stock for the benefit of all the minority stockholders. It is not necessary to refer fully to the evidence bearing upon this point.

It appears from the correspondence and from the negotiations with the executors with reference to an option which had been given to a third party which affected the interest of all of the Minneapolis stockholders. It appears from the conduct of the parties in several meetings, where the question of mutual protection was discussed. It appears from the methods discussed for payment by utilizing the cash of the company on hand and by the execution of company notes. In their effort to impress upon the Haskell executors the advisability of dealing with the stockholders, rather than with a third person, defendants emphasized the fact that the good will of the Journal was owing largely to the personality of the Western stockholders, most all of whom had been with the Journal during the entire twenty-three years of the present management. It was testified to by the attorney representing the executors, as well as by one of the executors, that such was their understanding, and that the option contract was taken in the name of the defendants for the sake of convenience and simplicity.

The plaintiffs certainly understood that the option was being secured for their benefit, as well as for the benefit of the defendants, and were not called upon to inquire into the nature of the instru-

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ment, to see whether they were expressly protected. Indeed, the defendants did not seriously contend otherwise at the trial. Their position was that the option was taken with the understanding that the stock would be purchased for the purpose of continuing the business, but that Mr. Swift afterwards determined to sell his stock and retire, and the other stockholders, including Mr. McLain, were given an opportunity to purchase his shares, as well as the Haskell stock; that they were unable to finance the deal, and that it was then determined to sell the entire capital stock to Messrs. Jones, and in order to accomplish a sale it became necessary to secure a concession from the executors, and that the cash purchase at a discount was the result. Defendants claimed that this amounted to a new deal between them alone and the executors, and that plaintiffs received the $300 per share as contemplated, and have no interest in the money saved by the refund.

Defendants may have been sincere in believing they had a right to the refund, but their relation to the other stockholders was fixed by the option. As stated above, the right to purchase the Haskell stock inured to the benefit of the plaintiffs, although not named as purchasers. The purchase of the stock was pursuant to the option. By virtue of its provisions defendants had been able to prevent the executors from dealing with other parties, and it tied up the stock until October 15, 1908. The only change made was in the terms of payment, and, if defendants secured an advantage by paying cash, that advantage inured to the benefit of the parties they represented. The evidence sustains the trial court in finding that the defendants secured $45,100 without the knowledge of the plaintiffs and appropriated the refund to their own use; that they were acting in a fiduciary capacity and were accountable for the money so received.

2. Plaintiffs' appeal involves the question of the division of the refund and the allowance of certain attorney fees. The eighth finding of the trial court is as follows:

"In the aforesaid venture for the acquisition of the said twenty-four hundred shares the plaintiffs and defendants intended and agreed that if said stock were purchased they would pay for it by using the Journal Company's available funds, about $120,000, and

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by issuing bonds of that company secured by mortgage on its plant and property for the deferred payments, which they expected would amount to more than $500,000, and by using the future earnings of the Journal Company to meet such deferred payments. It was further their intention and agreement that the twenty-four hundred shares, if purchased, should not be canceled or be held as treasury stock, but that they should be owned by plaintiffs and defendants pro rata according to their then holdings of the Journal Company's stock. There was, however, no express agreement between the parties as to the part that each should have of said twenty-four hundred shares. Their agreement in this respect is inferred from the facts and circumstances in evidence."

This finding is of evidentiary facts, with the conclusion of law that it is to be inferred from the facts that the parties intended that the stock was to be divided pro rata. There was no question but that the facts are as stated in the findings. It was not the intention of the parties to cancel the stock, or to hold it in the treasury, and there was no express agreement as to how it should be divided; but it was thoroughly understood among all the parties that, in case the purchase was made the company's cash on hand, about $120,000, would be used for the purpose, and that the bonds of the company, secured by a mortgage on its plant, would be issued to meet the deferred payments.

Did the facts, as found, and the evidence, warrant the court in drawing the inference that it was understood the stock would be divided pro rata, according to the holdings of each stockholder?

The general rule is stated in 30 Cyc. 451, as follows: "The profits of a partnership are to be divided equally between the partners, however unequal may be their contributions of capital or of services, in the absence of an agreement express or implied to the contrary, or unless some fact or circumstance exists from which it may be inferred that the partners intended that the profits should be divided in unequal proportions." It is stated thus in 22 Am. & Eng. Enc. (2d Ed.) 101: "Where there is no proof of an agreement between the partners as to apportionment, the presumption will be that both profits and losses were to be divided equally. Such equality will be

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presumed, notwithstanding the fact that the contributions to the firm capital have not been equal, and whether the partners are or are not on a par with regard to skill, connection, or character, or whether they have or have not labored equally for the benefit of the partnership. * * * The presumption may be rebutted by evidence of circumstances showing that the partners intended differently. It is a question of intention, to be determined by a consideration of all the facts available for the construction of the contract."

The application of the rule is illustrated in the following cases: In Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054, the several partners had contributed different amounts to the partnership, but there was a total absence of any agreement for other than an equal division of the profits, and the rule was applied that upon a dissolution the presumption was that the profits were to be divided equally, and not in proportion to their respective contributions to the capital. In Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738, one partner had contributed the money, and the other had performed the services with reference to the purchase of a piece of real estate. A similar case is Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589, and also Rankin v. Black, 1 Head, 650.

However, the presumption that the profits are to be divided equally is not an irresistible one, but is a question of intention, to be determined by all the facts and circumstances. The case of Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384, furnishes a fair example of the exception. There the defendant was engaged in a large and lucrative business, and had agreed with A. to take him into partnership upon his marriage with his daughter. Nothing was said about duty, service, contribution to capital, nor as to the share A. was to have in the profits. In an action brought by A. to recover one-half of the profits, the court held that under the circumstances the presumption of equal division was overcome, and that his proportion of the profits was left to the judgment of the merchant.

Turning our attention now to the evidence in the case before us, a most important factor is that it was contemplated by all the parties to utilize the cash on hand, and to secure the deferred payments by notes or bonds and mortgage of the company. Up to the time that

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the option was executed, July 29, the subject of the division was mentioned in a general way, but always with a view to retaining the Haskell stock, if purchased, and to continue the business; but no definite arrangement was reached, and finally Mr. Swift announced that he wished to retire. It then became necessary for the other stockholders to purchase the interest of Mr. Swift, or, failing in that, to sell out the business and transfer the entire capital stock to a third party. Not being able to purchase the Swift stock and continue the business, the sale was made to Messrs. Jones at a profit of $45,000.

Another important factor is the influence of defendants by reason of their position and large holdings. Mr. Swift was the general manager, and owned eight hundred shares. He took the initiative to secure an option for the purchase of the Haskell stock, when he discovered that there was danger of the stock passing into other hands. The negotiations were conducted entirely by the defendants. They canceled the tripartite agreement and secured a reasonable price for all the stockholders by reason of their personal efforts and influence. Although a proposition was made to them for a division of the Haskell stock per capita at about the time the option was secured, it was rejected upon the ground that it was not a fair division; but in the event of continuing the business Mr. Swift suggested that each of the stockholders take a number of shares equal to the number owned by each, and that the balance be divided equally. This proposition, however, was not accepted.

The rule that the profits of a partnership are divided equally among the partners is based largely upon the fact that it is impossible, in the absence of express agreement, for a court to fix a proportionate value on the services of the respective partners. Had the plaintiffs and defendants not been stockholders, then the general rule might apply. But the interest of these parties as stockholders, their evident purpose to have the stockholders become finally responsible, according to the amount of stock held, for the deferred payments, and the whole course of conduct, leads to the conclusion that the presumption of equal division was overcome, and that the facts warranted the trial court in concluding that it was the intention to divide the stock or the profits pro rata, according to the amount of stock held by each.

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We find no error in the allowance of attorney fees.

3. But we are unable to agree with the learned trial court that the plaintiffs were entitled to participate in the assets as well as in the refund. After the negotiations with the executors had terminated successfully in the execution of the option contract, at the suggestion of plaintiffs, Frisbie and McLain were given a ten days' option by defendant Swift in which to purchase his eight hundred shares at the price of $300 per share, with the understanding that they might purchase the Haskell stock under the option already secured. The parties made some attempt to interest capital with a view of making such a purchase, thus enabling them to become the owners and to continue the business, but it resulted in accomplishing nothing. Mr. Swift then advised the plaintiffs that he had a party with whom he had been negotiating, and they were informed that the price would be $300 per share. The court found that this offer of Mr. Swift to sell his stock to the other stockholders was not made in good faith, and that the defendants fraudulently made the proposition for the purpose of inducing the plaintiffs to enter into the scheme for the sale of their stock at $300 per share.

While possibly Mr. Swift may have had good reason to believe that the other parties would not be able to purchase, the plaintiffs had the opportunity at least of doing so, had they been able. Probably the other stockholders were largely dependent on the co-operation and good faith of the plaintiffs in conducting such a deal; but we are unable to see that the charge of bad faith in this respect had any connection with the subsequent conduct of the defendants in accepting the assets for $200,000 cash. In the first place, the Joneses were unwilling to pay the entire purchase price of $1,200,000 in cash, and had suggested one million dollars, and that the vendors retain the assets. At the time Mr. Swift made the offer to the plaintiffs and to defendant McLain to sell them his stock, the contract with the Joneses had not been executed, and we discover nothing in the record to indicate that such offer was made for the purpose of inducing the plaintiffs to sell at $300 per share, or to cover up a secret deal for the assets to the advantage of defendants, or either of them. Defendants had no personal knowledge of the exact value of the assets,

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except that there was about $100,000 in cash on hand. The value of the balance was somewhat speculative. Defendants assumed the obligation of guaranteeing the purchasers from lawsuits, and no doubt made this part of the deal a personal matter for the purpose of bringing the sale to a close.

That there was no intent to conceal anything from the plaintiffs with respect to the substitution of the assets appears from the conduct of the defendants themselves. Plaintiff Tuller was informed during the negotiations with Messrs. Jones that the subject of defendants assuming the assets in lieu of cash was under consideration, for he was called on by Swift to furnish an estimate of the value of the assets, and he estimated their value at something less than $200,000. He testified that he did not inform his associates, the other minority stockholders, that such negotiations were pending, and that he supposed he should treat the information obtained as confidential. But Mr. Swift made no request of that kind, and there was no proof that the Jones contract was kept from the knowledge of plaintiffs. When the directors met on August 27 for the purpose of authorizing the company to carry the contract into effect, plaintiffs Chamberlain and Tuller were present as directors, and were notified by the resolution and the minutes of the meeting, although previously prepared, that the substitution was to take place, and that the defendants were to take the assets as a part of the consideration of the purchase of their stock. On September 2, at the time plaintiffs received $300 per share for their stock, each of them, with the exception of Webster, knew that such arrangement had been made, that only one million dollars in cash was paid by Messrs. Jones, and that the defendants were to receive the assets in lieu of the other $200,000. They received the money without protest, with full knowledge of the facts, and they could not remain silent, even if prior to that time they had been led to believe that the entire purchase price was paid in cash, or that the defendants were acting in the capacity of trustees in receiving the assets. They would not be permitted to receive their full proportion of the full cash price, and wait to see whether there would be any profits in the transaction, before repudiating it.

But we do not base our conclusion upon this ground alone. From

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a reading of the record we are satisfied that the substitution of the assets for cash in the purchase of the defendants' stock was made in good faith, for the purpose of completing the deal and satisfying the demand of Messrs. Jones, and to enable defendants to complete the transaction without putting up the extra $200,000 in cash, and not for the purpose of acquiring additional advantage to themselves.

The conclusion we have reached leads to affirmance in so far as the plaintiffs are entitled to participate pro rata in the $45,100, and to affirmance on plaintiffs' appeal, but to a reversal of that part of the order which orders judgment that the plaintiffs are entitled to participate in the assets.

So ordered.

JAGGARD and SIMPSON, JJ., took no part.

On March 24, 1911, the following opinion was filed:

LEWIS, J.

A reargument was granted on the question whether the $10,000 left over from the proceeds of the Barbour and Bickelhaupt shares belonged to the several stockholders or was a part of the assets taken over by defendants.

In 1906 the Journal Printing Company had become the owner of one hundred sixty shares of the company stock, and on the seventh day of September, 1906, entered into a contract with plaintiff Barbour by which it sold to him eighty shares of the stock at $150 per share, or $12,000, to be paid for on or before October 1, 1910, with interest at six per cent., dividends to be applied in payment. Among other things, the contract provided that, if at any time within five years "the stockholders shall sell all the company's stock in a lump or bulk sale, the employee, in lieu of all rights of every kind under this contract, shall be entitled to participate in such distribution and in the proceeds of such sale to the following extent, and no more: If the sum realized from such distribution or from such sale shall exceed one hundred fifty dollars ($150) per share, the employee shall be entitled to receive one-sixtieth (1/60) of such excess for each month

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during which this contract shall, at the time of such distribution or sale, have been in force, beginning with October, 1905, and the employee hereby waives all right to object to such distribution or sale, and hereby consents thereto." A similar contract for the sale of eighty shares was entered into with plaintiff Bickelhaupt, of date October 11, 1906. On November 28, 1906, the board of directors of the company by resolution caused these one hundred sixty shares of stock to be issued to defendant Swift as trustee, in trust to receive and apply the dividends in payment of the stock in accordance with the terms of the contracts. The stock was issued accordingly, and accounts were opened by Swift as trustee, and the purchasers were each charged with the purchase price, $12,000, and interest, and were credited with the dividends and cash applied in payment. On the eighth day of July, 1908, the last dividend was credited, and the account then showed that Barbour still owed $8,588.86 on his stock, and Bickelhaupt $9,419.14 on his. On the thirty-first of August, 1908, the four thousand shares, constituting the entire capital stock, were transferred by defendants to Jones, and on the first of September Mr. Swift paid to the company on Barbour's contract $8,622.97, and paid Barbour $10,237.22; and he paid the company on Bickelhaupt's contract, $9,444.94, and to Bickelhaupt $9,555.06. He also paid $139.81, which Barbour owed the company. It was conceded that the contracts had run thirty-five months, and in making settlements with them Mr. Swift allowed each of them 35/60 of $12,000, as provided by the contracts. The one hundred sixty shares were sold for $48,000, and the total amount paid by Mr. Swift on their account was $38,000.

Who was entitled to this $10,000 surplus? The contract provided that, if the employees should fail to remain in the employ of the company for five years from October 1, 1905, the contract should become void, and, further, that if within said five years the assets should be distributed to the stockholders, or all of the stock should be sold in a lump or bulk sale, then their interest in the excess over the cost to them was limited as above stated. Their stock had not been paid for in full, and only thirty-five of the sixty months had transpired. The sale of the entire capital stock to Jones was a lump

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or bulk sale within the meaning of the contract, and hence Barbour and Bickelhaupt were limited to 35/60 of the $12,000 excess.

Jones makes no claim upon this $10,000, and the question of ownership is between the defendants and the plaintiffs. Defendants claim it as a part of the assets taken over by them in lieu of the $200,000 cash. Plaintiffs deny that this money was a part of the company assets, and insist that, according to the terms of the contract between Barbour and Bickelhaupt, the surplus, if any, upon a bulk sale, was reserved to the stockholders. At the time that contract was entered into the one hundred sixty shares were the property of the company. The plan seemed to be to make it an inducement to the employees to remain in the employ of the company. If they had defaulted in the payments, or had quit the service of the company within five years, the contract would have become void, and the company would have remained owner of the shares. Mr. Swift held them in trust only, subject to the conditions of the contract. If the shares had reverted to the company for noncompliance with the contracts, and had been sold and transferred to Jones with the other assets, the proceeds would have been a part of the assets of the company. Since this surplus belonged to the company, it passed to the defendants as part of the assets, unless something in the contract expressed a contrary intention. We find nothing to that effect. Barbour and Bickelhaupt construed their contracts by accepting 35/60 of the surplus, and no suggestion was made by any one that the money did not belong to the company. Mr. Tuller took it into account as a part of the assets of the company when he made the estimates upon which the deal with Jones was completed.

As determined in the previous decision, defendants were entitled to retain all the cash on hand August 31, 1908, and we now hold that the $10,000 surplus passed to the defendants with the other assets of the company.

SIMPSON, J., took no part.

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MIKKI HIVANEN v. DULUTH & IRON RANGE RAILROAD COMPANY and Another.[1]

January 20, 1911.

Nos. 16,925—(156).

Homestead entry — cancellation without notice — equitable title.

The plaintiff, a qualified homesteader, on August 15, 1900, made settlement and entry on certain land under the United States homestead laws, which the notes of the survey thereof showed was swamp. With his entry application he filed a statement, sworn to by him and two witnesses, that the land was not swamp. The local land officers appointed December 11, 1900, for a hearing of the contest; but no notice was given to him of the hearing, nor did he have any knowledge thereof. The contest was dismissed for the alleged reason that he did not appear and prosecute the contest. His homestead entry was afterwards canceled, and the land, which was never swamp, was thereafter certified to the state and deeded by it to the appellant May 3, 1904. The plaintiff went into actual possession of the land September 13, 1900, as his homestead, made permanent improvements thereon, and duly and in good faith performed or tendered performance of all acts which were essential to complete his title to the land, and was prevented from securing the legal title only by the mistake and inadvertence of the land department. The appellant had notice of the rights and equities of the plaintiff when it received its deed for the land. The trial court found such facts, and as a conclusion of law that the plaintiff was the equitable owner of the land, the naked legal title to which was held by the appellant in trust for him. *Held*, that the findings of fact are sustained by the evidence, and that the conclusion of law is correct.

Action in the district court for St. Louis county against Duluth & Iron Range Railroad Company and Iron Queen Mining Company to determine adverse claims to certain land. The separate demurrer of the railroad company was overruled. The railroad company then answered, and alleged that it was the owner in fee simple of the land, but that plaintiff was in possession and refused to deliver possession to defendant railroad company. The case was tried before Dibell, J., who made findings of fact and conclu-

[1]Reported in 129 N. W. 510.

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sions of law, as stated in the opinion. From the decree that plaintiff was the equitable owner of the land in question, entered pursuant to the order for judgment, defendant railroad company appealed. Affirmed.

Crassweller, Crassweller & Blu and *Frank D. Adams,* for appellant.

I. Grettum, for respondent.

George T. Simpson, Attorney General, and *Lyndon A. Smith,* Assistant Attorney General, filed a brief for the State.

START, C. J.

This action was brought in the district court of the county of St. Louis to determine adverse claims to the real estate described in the complaint, and the appeal is by the defendant Duluth & Iron Range Railroad Company, hereafter referred to as the Railroad Company, from a judgment whereby it was decreed that the plaintiff was the equitable owner of forty acres of the lands, the naked legal title of which was held by the Railroad Company in trust for the plaintiff. The cause was tried by the court without a jury. The findings of fact, so far as here material, are to the effect following:

On April 27, 1885, the United States surveyor general for the state of Minnesota made a list of lands, known as "swamp and overflowed lands," within the meaning of the act of congress granting such lands to the state. The forty acres here in controversy, hereafter referred to as the "forty," was included in this list. On April 29, 1885, a copy of such list was filed in the proper land office at Duluth, and on the same day a plat of the lands was also filed, and the lands described in the list were designated on the plat as "swamp land," and also in the tract book in such office. On February 8, 1904, the list was approved and certified by the secretary of the interior as swamp lands, and on March 12, following, the lands described in the list were patented to the state of Minnesota as swamp lands. The forty was not in fact swamp land at the time of the grant to the state, and has never been since. On May 3, 1904, the state executed a deed of the forty to the railroad com-

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pany which was duly recorded in the proper office. On August 7, 1900, the plaintiff was in all respects duly qualified to make a homestead entry under the laws of the United States, and on that day he duly made his homestead affidavit and application to enter the forty, with other lands, as a homestead, before the United States commissioner at Ely, which were sent to the local land office at Duluth and were received and filed therein on August 15 following. The register of the land office certified at the bottom of the application that it was for lands of the class the applicant was legally entitled to enter, and on the face of the application the words "Allowed subject to swamp." He also issued duplicate receipts for the entry fee and indorsed on the one sent to the general land office these words: "Subject to swamp claim of state." But these words were not indorsed on the duplicate delivered to the plaintiff.

The plaintiff made his affidavit of contest, which, with a corroborating affidavit, was filed in the local land office August 15, 1900, and on the following October 20 the register made a notice reciting the filing of such affidavit of contest against the state, and required the parties to appear before the register and receiver on the day fixed therein for hearing on December 11. No notice of this hearing was sent to plaintiff by mail or otherwise, or served upon him, or received by him, nor did he in any way have actual notice of such hearing. On December 11, 1900, the day appointed for the hearing, the contest was dismissed for the alleged reason that the plaintiff had failed to prosecute the contest. Notice thereof was sent to him at Ely, Minnesota, his post office address, April 1, 1901, by registered letter; but it never reached him, and it was returned unclaimed. Nor did he appear in any of the proceedings relative to such contest. On August 13, 1901, the commissioner held the entry for cancellation, with the usual right of appeal, and directed that notice thereof be given said plaintiff, and that a further report be made. On December 6, 1901, the commissioner, upon report made of the service by registered mail of notice of the decision of August 13, 1901, canceled entry and directed the land office at Duluth to make proper notations and advise the parties in

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interest of such action. No notice of the decision of the commissioner of December 6, 1901, canceling his homestead entry, was sent to him or given to him in any way, nor did he ever have notice thereof; and from the time of the making of his homestead affidavit and entry he received no notice of any kind relative thereto, and he had no notice or knowledge of any proceeding taken in the land office relative to his entry and contest.

On September 16, 1900, the plaintiff moved upon the land, commenced clearing it, erected two dwelling houses thereon, and made improvements thereon to the value of more than $1,500. He so entered upon the lands, occupied them, and made such improvements in good faith, intending the same as a permanent home. He did not, and does not now, read or write the English language. Nor did he understand the land laws, and while he instituted the contest he did not understand the nature of the proceeding, and believed that all that was necessary in order to acquire title to the land was to reside thereon the requisite period, make the necessary improvements, and in due time make proof of his settlement. On December 26, 1905, he made application to submit his final homestead proof to the United States commissioner at Ely. A time and place for such hearing was fixed, notice thereof duly published, and the proof taken and forwarded to the land office at Duluth. The proof was rejected because his entry conflicted with the swamp land grant to the state, and not because of any insufficiency of the proof. Notice of such rejection was given to him, and this was the first notice or knowledge on his part of any adverse claims to the lands included in his entry.

The railroad company, at the time it acquired the interest in the forty which it claims, had notice of the plaintiff's claim thereto. The patent to the state was issued through mistake, inadvertence, and error, without a determination of the contest of the plaintiff, and without notice to him of a hearing of the contest, and without any determination, in fact, of the character of the lands covered by the patent; and but for the failure to give him notice of the hearing he would have established in the land department his right to the lands and would have sustained the contest instituted by him.

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As a conclusion of law the trial court directed judgment for the plaintiff to the effect that he was the equitable owner of the forty, the naked legal title of which was held by the railroad company for him.

The first group of assignments of error raises the question whether the complaint as amended states a cause of action. The complaint is not to be commended as a model pleading, but, liberally construed, it crudely states a cause of action as against the railroad company.

The next group of alleged errors raises the question whether certain of the findings of fact are sustained by the evidence. The first one in importance is that the finding that the forty, at the time the swamp land grant was made to the state, was not swamp land. There was no direct evidence to the effect that the land was not swamp land at or before the time the grant was made. It is apparent that it would have been impracticable to have produced witnesses who saw the land before the grant was made. There was, however, evidence tending to show the character of the land, its fitness for cultivation, and its topography, which fully justifies the inference and finding of the trial court that it was not swamp land at the time of the grant.

Other assignments of error are to the effect that the evidence does not support the finding that no notice of the time and place of hearing of the contest fixed for December 11, 1900, was ever given to the plaintiff in any manner, nor the finding that no notice was served on him in any manner of the decision of the commissioner of December 6, 1901, canceling his entry. Each of the findings is sustained by the evidence, which shows that only two notices were sent to him, one of April 1, 1901, as to the dismissal of the contest of December 11, 1900, and one relative to the decision of the commissioner holding the entry for cancellation.

The only other assignment of error relating to the findings of fact is, in effect, that there is no evidence to sustain the finding that the patent to the state for the land was issued through mistake and inadvertence. This finding and conclusion must rest upon the finding that no notice was given to the plaintiff of the time and place

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of the hearing of the contest and its materiality. If the plaintiff was entitled to such notice, and it was not given, the issuance of the patent, upon the assumption that the notice had been given and the contest terminated, was by mistake and inadvertence. It follows that the pivotal question presented by the record is whether the plaintiff, by the rules and practice of the general land office, was entitled to such notice. The grant to the state was one in præsenti, but it included only swamp land as defined by the grant; hence, if the land in question was not swamp, then title thereto never passed to the state, and it was subject to settlement and entry by the plaintiff, for he was a qualified homesteader. While this is true, the adjustment of the grant, and a determination whether the forty was or was not swamp, was a matter within the jurisdiction of the general land office, to be determined in accordance with rules and procedure prescribed by it and in force *at the time* of the plaintiff's settlement and entry. Such rules were changed from time to time. Lachance v. State, 4 Land Dec. Dep. Int. 479 (April 7, 1886); General Circular, 5 Land Dec. Dep. Int. 279 (Dec. 13, 1886); Sutton v. State, 7 Land Dec. Dep. Int. 562 (Dec. 22, 1888); Secretary's Letter, 32 Land Dec. Dep. Int. 65 (March 16, 1903); Lampi v. State, 37 Land Dec. Dep. Int. 385 (Jan. 7, 1909).

In the Lachance case it was held that, although the survey might show the land within the grant, a settler on the land might attack the survey and have it vacated for fraud; and in the subsequent case of Sutton it was held that it was not necessary to show fraud in making the survey, but that it was sufficient to show a mistake therein as to the character of the land. After the plaintiff's settlement and entry in 1900, and in 1909, it was held in the Lampi case that the settler must apply for a hearing on and assume the burden of the contest as to the character of the land, but obviously the decision is not here relevant.

The circular letter of December 13, 1886, promulgated rules as to entries and filings on lands selected, to the effect, so far as here material, following: (1) When a settler applies to enter such land, his application must be accompanied with a sworn statement of himself and two corroborating witnesses that the land in

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its natural state is not swamp. (2) On filing such application and statement the register must notify the Governor of the state and allow him sixty days in which to object and apply for hearing on behalf of the state to prove the character of the land. (3) The burden of proof is on the state. (4) If the Governor does not make such application, the state will be deemed concluded from asserting a claim. (5) The foregoing applies only to those states whose claims are adjusted by examinations in the field. (6) Where swamp land selections are based upon the field notes of survey, and the land is alleged not to have been in fact swamp, the burden of proof will be upon the contestant or adverse claimant under the public land laws.

The state of Minnesota accepted the proposition of the general land office to adjust its swamp land grant on the basis of the surveys, subject to the right of such land office to supervise their selection and its right to hold them subject to its control until they shall have been patented. The secretary's letter of March 16, 1903, directed, with certain exceptions, that in all contests *thereafter* begun with reference to swamp lands in Minnesota the character of the land should be determined by the field notes of the survey. It is not necessary to construe this letter of March 16, 1903, for the rights of the plaintiff must be determined by the rules in force prior to that date.

The rules and procedure established by the circular of December 13, 1886, are in some respects uncertain by reason of subdivision 5. One thing, however, is clear: It was not intended thereby to except from the operation of subdivisions 1, 2, 3, and 4 of the circular states which had accepted the surveys as a basis for the adjustment of their grants; otherwise there could be no contests in such cases of any kind as to the character of any land included in the survey, although it was palpable that it never was swamp. Again, subdivision 6 of the circular expressly recognizes that contests may be made where selections are based on the field notes, and such has been the practical construction of the circular by the land department. The only effect of subdivision 5 of the circular would seem to be that it changes the burden of proof as to the character of the land from the state to the contestant in states which elected to

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have their grants adjusted on the basis of the surveys. Putten v. State, 19 Land Dec. Dep. Int. 180 (Oct. 9, 1894).

However this may be, a consideration of the rules and procedure of the land office in force at the time of plaintiff's application and entry has led us to the conclusion, as it did the learned trial judge, that the plaintiff was entitled to notice of the time fixed for the hearing of the contest, and that the subsequent notice by registered letter of the dismissal of the contest did not remedy the failure to give the notice of hearing conceding that by the rules of the land office notice to a contesting homesteader by registered mail is sufficient.

It follows that the patent in this case was issued to the state by mistake of fact and law. The forty in question was not in fact swamp land. The plaintiff in entire good faith entered upon the land for the purpose of acquiring title thereto under the homestead law. Upon it he struggled for years with the elements and the wilderness in his efforts to create a permanent home for himself, his wife, and seven children. He cleared and plowed a part of the land, erected thereon two dwelling houses and a barn, dug two wells, and made permanent improvements to the value of more than $1,500. His possession was notice to the railroad company, at the time it received its deed from the state, of his rights and equities in the land. The land department, in fact, never passed upon the question whether the land was swamp land or not, but dismissed the contest because the plaintiff did not appear at a hearing of which he had no notice. The plaintiff in good faith performed, or tendered performance, of all acts, which were essential, under the homestead laws, to complete his title to the land, and was prevented from securing the legal title thereto only by the mistake of the land officers. This case then falls within the rule established in the case of Roy v. Duluth & I. R. R. Co., 69 Minn. 547, 72 N. W. 794, and 173 U. S. 587, 19 Sup. Ct. 549, 43 L. ed. 820, and the defendant railroad company holds the legal title to the forty in trust for the plaintiff, the equitable owner.

Judgment affirmed.

SIMPSON, J., took no part.

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MARIE G. AUSTIN v. WILLIAM Z. MOFFETT.[1]

January 20, 1911.

Nos. 16,945—(128).

Assault — verdict not excessive — denial of new trial.

The plaintiff recovered a verdict for $1,000 against the defendant for a personal assault. *Held*, that the verdict is sustained by the evidence, the damages are not excessive, and the court did not abuse its discretion in denying a motion for a new trial on the ground of newly discovered evidence.

Action in the district court for Hennepin county to recover $5,000 for assault. The facts are stated in the opinion. The case was tried before Hale, J., and a jury which returned a verdict of $1,000 in favor of plaintiff. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Stevens & Stevens, for appellant.

Evans & Peterson, for respondent.

START, C. J.

Appeal by defendant from an order of the district court of the county of Hennepin denying his motion for a new trial. The complaint alleged that the defendant assaulted the plaintiff, a married woman, whereby she sustained serious personal injuries. The answer denied the allegations of the complaint as to the assault. The plaintiff had a verdict for $1,000. The alleged errors here relied upon for a reversal of the order are that the verdict is not sustained by the evidence, that the award of damages is excessive, and that the court abused its discretion in denying a new trial on the ground of newly discovered evidence.

The evidence of the parties is radically conflicting. The plaintiff testified to facts showing that the assault was committed, which the defendant positively denied. The credibility of the respective parties was a question for the jury, and the evidence is sufficient to

[1]Reported in 129 N. W. 388.

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sustain the verdict. The award of damages is not excessive, if the plaintiff's testimony is reliable. She testified to the effect that she was pregnant at the time of the assault, but in good health and physical condition; that the defendant came to her house to serve some papers; that he was very angry, and told her that if she did not settle the matter in three days he would come and kick her out; that he was on the porch and she on the inside, when he reached for her through the open door, and she jumped back; that she then felt the child drop, and she immediately became sick, and was confined to her bed for six weeks; and, further, that she has been in a nervous condition ever since. The defendant denied that he threatened the plaintiff or in any manner interfered with her. It is urged that the plaintiff's testimony is improbable, and that, even if it be conceded to be true, it fails to show that the defendant's acts were the proximate cause of her subsequent physical condition. We are of the opinion that this, under the evidence, was a question of fact for the jury, and the damages are not excessive.

Whether the trial court abused its discretion, in view of the sharp conflict in the evidence as to the main issue, in not granting a new trial on the ground of newly discovered evidence, is the most important question presented by the record. We have carefully considered the several affidavits in support of a motion for a new trial on this ground, in connection with the record of the trial. We have reached the conclusion that the discretion of the trial court was fairly exercised. It will serve no practical purpose to discuss in detail the affidavits. It is sufficient to say that the alleged newly discovered evidence was cumulative, or impeaching, or newly remembered.

Order affirmed.

JAGGARD, J., took no part.

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BOARD OF WATER COMMISSIONERS v. GEORGE BELLAND and Others.[1]

January 20, 1911.

Nos. 16,951—(203).

Protecting water supply from pollution — closing highway — right to injunction.

Action to restrain the town authorities of White Bear from removing a fence erected by the plaintiff across a public highway, leading from Edgerton street to Vadnais Lake, a meandered body of water, from which St. Paul derives a portion of its water supply. The fence was erected to prevent access to and the pollution of the waters of the lake. The maintenance of the fence will better enable the plaintiff to prevent the pollution of the waters, and it may be maintained for that purpose under proper conditions without material prejudice to the defendants or the public. The plaintiff has never, by condemnation proceedings or otherwise, acquired any rights in the highway as against the public. The trial court directed judgment permanently restraining the defendants from removing the fence, provided a gate be maintained therein.

Held, that the plaintiff is authorized to acquire, by condemnation proceedings, such limited use and control of public highways, subject to proper conditions, as the court in which the proceedings are pending may find to be necessary for the protection of the water supply of the city. After such right has been lawfully acquired, a court of equity has power to protect the plaintiff in the exercise of the right; but it has no power to create it in the first instance. The court erred in directing a permanent injunction to issue.

Action in the district court for Ramsey county to enjoin defendants from removing or in any way interfering with a certain wire fence erected by plaintiff along the west side of Edgerton street to prevent access to, and pollution of, the waters of Vadnais lake. The answer alleged that plaintiff unlawfully erected a fence across a public highway of the town of White Bear and threatens to keep the same fenced regardless of the objections of the town authorities, and prayed that

[1]Reported in 129 N. W. 389.

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plaintiff be forever enjoined from obstructing the highway. The case was tried before Hallam, J., who made findings of fact and conclusions of law, as stated in the opinion. From an order denying defendants' motion to amend the conclusions of law or for a new trial, they appealed. Reversed and new trial granted.

O. H. O'Neill, for appellants.

J. C. Michael and *Kenneth G. Brill,* for respondent.

START, C. J.

This action was brought in the district court of the county of Ramsey to restrain defendants from removing a fence erected by the plaintiff to prevent access to and the pollution of the waters of Vadnais Lake, from which the city of St. Paul obtains a large part of its water supply. The answer alleged, in effect, that the fence in question was erected by the plaintiff in a public highway of the town of White Bear, and by direction of the town board the defendants tore down the fence, which was an obstruction in the highway.

The cause was tried by the court without a jury, and findings of fact made to the effect following:

The plaintiff, acting in pursuance of the powers vested in it by law, and particularly by chapter 9 of the charter of the city of St. Paul, duly instituted proceedings to condemn a strip of land entirely surrounding Vadnais Lake and adjacent thereto, for the purpose of supplying the inhabitants of the city with a supply of pure water from the lake. As a part of such proceedings on July 5, 1904, it duly filed with the register of deeds of the proper county a map of the lake and land adjacent thereto, and indicated thereon the land necessary to be taken by it for such purpose. Thereafter the city acquired by purchase the fee title to all the land adjacent to the lake, including the land upon which the road hereafter mentioned was located, and purchased the land adjacent to and including the fee of the south half of the road herein mentioned, on December 31, 1907, and purchased the land adjacent to and including the fee of the north half of the road on or about August 21, 1908. Since the year 1878 there had been and now is a town road included within the land so indicated on the map, extending from Edgerton street on the east to

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the waters of the lake on the west. The road is of value to the defendants and the public only as a means of access from Edgerton street to the waters of the lake, and is used only for that purpose. The map referred to does not show the existence of the highway or road. Prior to the commencement of this action, and in December, 1909, the plaintiff erected a fence across the road at the point where it joins Edgerton street, which the defendants, by the direction of the town board, removed, and they threatened to remove and destroy any fence erected by plaintiff across the road. The plaintiff has rebuilt the fence. The plaintiff supplies the inhabitants of the city of St. Paul, from the lake, with water for drinking and other purposes. The road slopes from Edgerton street towards the lake. The flowage of the waters of the lake at times covers a part of the road, and may at a high stage of water in the lake cover all of the same and reach the fence. Prior to the erection of the fence the public could, and did, drive over the road into the lake, and upon the ice on it, and pollute the waters thereof, and will continue so to do unless the fence is maintained, and the use of the road and the taking of the water and the ice from the lake regulated by the plaintiff. The use of the road by plaintiff is, and reasonable rules and regulations for its use prescribed by plaintiff will be, without detriment to the use of the road by the public, for the only purpose for which it is of value or has been used, and the fence may be maintained by the plaintiff without material prejudice to the defendants or the public. The access of defendants and the public to the lake by means of the road for the purpose of taking water and ice therefrom, if under proper regulations and restriction, will not pollute the waters of the lake. The lake is a meandered body of water outside the corporate limits of the city of St. Paul, approximately one and one-half miles long and three-quarters of a mile wide.

The conclusion of law from these facts was to the effect following:

The plaintiff has the right to take reasonable means and enforce reasonable rules to prevent the pollution of the waters of the lake, and it is entitled to a permanent injunction restraining the defendants from removing or destroying the fence, or in any way interfering with the same, provided the plaintiff shall provide a gate in the fence

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by means of which the defendants and the public may have ready access to the shore of the lake with teams for the purpose of removing water and ice therefrom, without driving into the same or polluting the waters thereof.

Judgment was ordered accordingly. The defendants appealed from an order denying their motion to amend the conclusions of law and for a new trial.

The assignments of error, reduced to their lowest terms, raise the question whether the findings of fact of the trial court, as to the pollution of the waters of the lake by the public and its continuance unless the fence in question is maintained, are sustained by the evidence, and whether the court's conclusion of law and direction for judgment are justified by the facts found. The evidence leaves the first question a debatable one, for the trial court might have found for the defendants upon the question; but a consideration of the record satisfies us that the evidence is sufficient, within the rule applicable to such cases, to sustain the findings of fact.

The second question whether the facts found justify the conclusions of law is a more serious one. While it is true that the plaintiff owns the fee of all land adjacent to the lake, yet a strip of the land sixty-six by one hundred sixty-three feet, across which the fence is built, is subject to the easement of a public highway, extending from Edgerton street, a public thoroughfare, to the meandered lake. The trial court expressly found that this strip was an existing public highway. It is also true that the only public use of this highway is to afford access to the lake, the protection of the waters from pollution of which is vested by law in the plaintiff. This authorizes the plaintiff to do any act reasonably necessary for accomplishing such purpose, including the exercise of the power of eminent domain. City Charter, c. 9, §§ 4, 5. We are of the opinion that the plaintiff is authorized to take, by the due exercise of such power, such limited use and control in public streets and highways as the court in which the proceedings are pending find to be reasonably necessary for the protection of the water supply of the city. If, then, the court's findings of fact show that the plaintiff has so acquired the right to maintain a fence and gate in the highway in order to prevent the pollution of the waters of

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the lake, the court's conclusion of law is correct; otherwise not, for if the plaintiff has not acquired such right the court cannot confer upon it such right, even upon conditions.

The trial court, and counsel for plaintiff in their brief, attach controlling importance in the determination of the question to the action of the plaintiff in instituting condemnation proceedings in July, 1904. We are unable to find, in the findings of fact or in the entire record, anything to justify the conclusion that the plaintiff had acquired in any manner the right to close the highway in 1909, and thereby deprive the public of free access to the lake. There was no recognition of any public right in the lands sought to be condemned, nor does the record show that the proper public authorities were ever in any manner advised of any purpose to acquire any interest in the highway which would in any manner impair the public easement therein. On the other hand, the record affirmatively shows that the plaintiff, after making and filing the map, acquired by purchase the fee to all of the land it sought to condemn; but it fails to show that any further action was taken in the condemnation proceedings, not even an application to the court for the appointment of commissioners.

The clear inference from the record is that the plaintiff, after it acquired the fee to the land, abandoned the condemnation proceedings; but if, as suggested by the trial court, they are still pending and involve the public easement in the highway, nevertheless the conclusion of law and order for judgment are not justified by the findings of fact. This is obvious from a mere reading of the conclusion of law, which does not merely enjoin the public authorities from interfering with the fence until condemnation proceedings can be consummated, but it enjoins them permanently, and confers upon the plaintiff the right for all time to maintain a fence across the public highway on condition that it maintains a gate therein. This necessarily relieves the plaintiff from any duty of acquiring such right by condemnation proceedings.

In reaching the conclusion that the trial court's conclusions of law are not justified by the facts found, we have not been unmindful of the fact that an ample supply of pure water for the city is of the ut-

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most importance, and that to secure such beneficent result the powers conferred upon the plaintiff must be liberally construed, and, further, that in view of the limited extent, importance, and use of this particular highway, the relief granted by the court results in but little inconvenience to the public, but, on the other hand, materially facilitates the commendable efforts of the plaintiff to secure pure water for public use. If such an order had been made in condemnation proceedings after hearing of all parties interested, including the public authorities of the town, and an adjustment of conflicting public interests, it may be conceded that the order would have been valid.

Such, however, is not this case, which is simply one where the plaintiff, without securing the right so to do, erects a fence across a public highway, and then invokes the aid of a court of equity to keep the fence there, and the court grants relief on condition that a gate be maintained in the fence; that is, grants to the plaintiff the right to convert a public highway into a pent road. Such right must be first secured by negotiations with the public authorities or by condemnation proceedings. A court of equity can give effect to the right when once lawfully acquired, but it cannot create the right in the first instance. The fact that the highway in this particular case is a short one and little used by the public is not significant; for if the plaintiff be permitted to close this public highway, without first securing the right so to do, and then invoke the aid of equity to keep it closed, a dangerous precedent will be established, which will enable the plaintiff to close arbitrarily any or all public highways, whenever in its judgment it deems such act to be necessary to protect the water supply of the city.

Order reversed, and a new trial granted.

SIMPSON, J., took no part.

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STATE ex rel. COUNTY OF PENNINGTON v. DISTRICT COURT OF RED LAKE COUNTY and Others.[1]

January 20, 1911.

Nos. 17,007—(262).

Inconsistent statutes incorporated in revision of statutes.

State v. District Court of Hennepin County, 107 Minn. 437, to the effect that where two inconsistent statutes, relating to the same subject-matter, are both incorporated into a general revision, the court will, in construing them, inquire as to the date of the respective enactments, and give effect to the latest expression of the legislature, followed and applied.

Election contest upon question submitted to popular vote.

Sections 336 and 339, R. L. 1905, both provide for the contest of elections upon a "question submitted to popular vote," but under entirely different procedure. The two sections are in conflict, and it is *held*, under the rule above stated, that section 336 embodies the latest expression of the legislature upon the subject of such contests, and prevails over section 339, in so far as involves contests of that character.

Same — question of creating new county.

The question whether a new county shall or shall not be created and established, submitted to the voters under the statutes of the state, is independent and distinct from a proposition changing county lines, and not contestable under section 339, R. L. 1905, authorizing boundary line contests.

The county commissioners of Pennington county obtained from this court an alternative writ of prohibition directed to the district court for Red Lake county, and William Watts and A. Grindeland, the honorable judges thereof, and Ed. L. Healey, contestant of the election upon the proposition to establish said county, directing them to show cause why further proceedings in the matter of such contest should not be absolutely restrained. At the hearing in this court, the respondents moved to quash the writ. Motion denied, and writ absolute granted.

E. M. Stanton and *Edward T. Young*, for relator.

F. A. Grady and *Fred Farley*, for respondents.

[1]Reported in 129 N. W. 514.

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BROWN, J.

A proposition for the creation and organization of Pennington county out of territory forming a part of Red Lake county was duly and regularly submitted to the electors of the county at the November, 1910, general election. Returns of the election were duly made to the secretary of state, and on November 22, 1910, duly canvassed by the state canvassing board, who certified that the proposition had received a majority of the votes cast upon the question. Whereupon, and on November 23 the Governor of the state duly issued his proclamation, as required by law (section 386, R. L. 1905), declaring and proclaiming that the new county had been duly created and organized. Thereupon the board of county commissioners, elected in connection with the creation of the county, properly qualified and entered upon the work of completing the county organization.

On December 16, 1910, a contest of the election was instituted under the provisions of section 339, R. L. 1905, in and by which it was charged that the proposition to establish the county had not in fact received a majority of the votes cast. The statute under which the contest was instituted was in all things complied with, and if thereby authorized was regular in all respects. Relator then sued out an alternative writ of prohibition from this court, directing respondents, the contestant and the judges of the district court before whom the contest was pending, to show cause why further proceedings therein should not be absolutely restrained. At the hearing in this court respondents moved to quash the writ. This motion presents the only question involved, namely, whether a contest of an election for the creation of a new county may be maintained under the provisions of section 339, R. L. 1905. It is the contention of relator that if a contest of the election in such a case may be maintained at all, none being provided for by the statute authorizing the submission of the question to popular vote (chapter 143, p. 262, Laws 1893), it must be prosecuted under section 336, R. L. 1905. The solution of the question involves a construction of the two statutes mentioned.

1. Section 336 is broad and comprehensive, and provides that

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any voter may contest the election of any person declared elected to any state, county, or municipal office, or the declared result upon a constitutional amendment, *"or other question submitted to popular vote,"* by proceeding in the manner therein pointed out. It provides for an appeal to the proper court, to be taken within ten days after the result of the election has been duly declared, and that the notice thereof shall specify the points of the proposed contest. It provides for the service of notice upon the contestee when the contest relates to the election of an officer, upon the secretary of state when the matter submitted to popular vote affects the entire state or any subdivision thereof larger than a county, upon the county auditor when it affects a single county, and in all other cases upon the municipality affected. It also provides that the contestee may serve notice, within ten days after the perfection of the appeal, of an intention to offer evidence upon points not specified in the contestant's notice, and that such notices shall constitute the pleadings in the case, which shall be tried and determined in the manner provided for the trial of civil actions.

Section 339 provides that any voter may contest the election for the removal of a county seat, changing the boundaries of a county, *"or on any other question submitted to popular vote,"* by proceeding as therein directed. The contestant is required to serve upon the county board, or a member thereof, within thirty days, a notice specifying the grounds of the contest, and file the same with the clerk of the district court within ten days thereafter. It further provides that "no appeal to said court shall be required."

2. These statutes, at least as respects contests upon questions submitted to popular vote, are in irreconcilable conflict. Both provide for a contest upon those questions, but prescribe different methods of procedure. It would be impossible for either lawyer or layman to determine, in advance of a court decision, under which a particular contest might be maintained. If commenced under 336, the court might decide that it should have been prosecuted under 339; or, if under the latter section, the contest might be dismissed, because not commenced under the former. Both sections provide for a contest upon "questions submitted to popular vote." Section

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336 requires the contest to be commenced within ten days after the votes have been canvassed, by service of notice of appeal upon the county auditor; and 339 requires a notice of contest to be served upon the board of county commissioners or a member thereof within thirty days, without appeal to the court. Nor can the court, without legislating, declare that particular questions may be contested under 339 and others under 336.

While it is true that certain questions—for instance, the voting of bonds for the construction of a courthouse or other purposes, whether the county or township system for caring for the poor shall be adopted—relate exclusively to county matters, and might well be held contestable under 339, yet such matters are also included within the provisions of section 336, and a decision holding either applicable to a particular contest would be founded not upon a construction of the conflicting statutes, but upon the mere ipse dixit of the court. It is clear, therefore, that one or the other of the sections must yield and give way, to the end that definiteness and certainty may take the place of the present conflict and confusion.

3. The two statutes had their origin in sections 52 and 53 and section 56 of chapter 15, Laws 1861; sections 52 and 53 being the present section 336, and section 56 the present section 339. Section 339 has come down, through the revision of 1866 and various subsequent amendments to the general election law, and was incorporated in the revision of 1905, without substantial change. Originally it provided, as at present, for contests of elections involving county seats, propositions to change county lines, or any other question submitted to popular vote. Section 336 has undergone many changes since its original enactment; the tendency being, since the revision of 1866, to enlarge and extend its provisions. In fact, all legislation changing the law of election contests since 1866 has been by way of amendment to that section. Its history is outlined in a general way in State v. District Court of Hennepin County, 107 Minn. 437, 120 N. W. 894.

Prior to the revision of 1905, the omnibus clause, authorizing contests upon "any question submitted to popular vote," was found only in section 339. That clause was by the revision also inserted

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in section 336. The manifest purpose of this was to include all election contests, excluding legislative, in one comprehensive system, the procedure of which fully protects the rights of all interested parties. If this be not so, then we must ascribe to the legislature a deliberate intention to confuse the law on the subject, and of granting one right, with alternative inconsistent methods of asserting it. Obviously this was not the intention. On the contrary, the revision of the section was made with care, and discloses an evident purpose to simplify the statutes, and to produce one workable system of contests, applicable alike to all questions submitted to popular vote, and other contests there provided for.

The change so coming about is the latest expression of the legislature upon the subject, and, within the rule of the Excelsior case, must be given force and effect, to the exclusion of the provisions of section 339, authorizing similar contest, but under entirely different procedure. The failure of the commission to remove the omnibus clause from the latter section was clearly an inadvertence. In fact, the whole section might well have been omitted from the revision, for all contests there provided for may now be maintained under section 336. We do not, however, hold that the section was rendered wholly inoperative by the change. But it must be limited, to give effect to the clearly disclosed intention of the legislature, to the specific questions there provided for, namely, the removal of county seats, and changing the boundary lines of counties. All contests of other questions submitted to popular vote are governed by section 336.

4. But it is contended that the creation of a new county is in effect a change of the boundary lines of a county, and that an election therefor may be contested under that part of section 339 expressly providing for a contest of boundary line elections. In this we do not concur.

The creation of a new county is entirely separate and distinct from a proposition merely to change the boundaries of existing counties. The creation of new counties, though incidentally affecting county lines, involves the interests of the state at large, and is now exclusively committed to legislative control. The question

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whether a proposed new county should or should not be created was not, prior to chapter 143, Laws 1893, ever submitted to the electors, and the original enactment of section 339 in 1861 had no reference to questions of that character. It has, perhaps, applied to such questions since the act of 1893, but only under the general clause thereof permitting the contest of questions submitted to popular vote. The constitutional amendment prohibiting special election repealed by implication section 1 of article 11, and since then the submission of questions for the creation of new counties to popular vote has been one of favor by the legislature, and not because it was required by the constitution to do so. State v. Pioneer Press Co., 66 Minn. 536, 68 N. W. 769.

On the other hand, the change of county boundaries does not concern the whole state, but rather the counties affected, and therefore by right should be within the control of those immediately concerned. In fact, the creation of new counties and the changing of county boundaries has always been treated in legislation as separate and independent, and it cannot well be held as a judicial question that they are so related and interwoven that the one necessarily includes the other. It is clear, therefore, that an election for the creation of a new county does not fall within the clause of section 339 providing for contests of elections changing county lines.

5. The further contention of contestant that section 336 in its modified form is unconstitutional and void is not sustained. No valid objection to the re-enacted section, or the revision of the statutes as a whole, is pointed out, and reflection brings none to our attention.

It follows that no contest of the election establishing Pennington county, of which the court below has jurisdiction, was instituted by contestant, and the writ of prohibition prayed for is granted. The district court of the Fourteenth judicial district is therefore restrained and prohibited from further proceeding therein.

Let a writ absolute issue.

JAGGARD, J., took no part.

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STATE ex rel. RUDOLPH HOEFS v. DISTRICT COURT OF McLEOD COUNTY.[1]

January 27, 1911.

Nos. 16,742—(40).

Constructive contempt — affidavit.

The affidavit, the initiatory step in constructive contempt proceedings, need not be in any particular form, nor its allegations as direct, specific, and certain as required by law in indictments for criminal offenses.

Judgment of conviction.

The judgment of conviction in such proceedings must be construed in connection with the affidavit and order to show cause, the foundation of the proceeding, and need not recite all the facts there disclosed.

Costs — attorney's fee.

When the court is authorized by the facts to impose the punishment prescribed by section 4649, R. L. 1905, for contempt of court, it may award to the aggrieved party the costs and expenses of the contempt proceedings, including a reasonable attorney's fee.

Value of attorney's services — evidence.

Services of an attorney, rendered in the presence of the court, do not require evidence of their reasonable value. The court, when proper to be allowed, may fix the amount thereof from its knowledge of their value.

Violation of injunction — punishment.

Defendant was restrained by injunction from constructing a ditch and thereby lowering the waters of a meandered lake. Defendant in violation of the injunction constructed the ditch. It is *held* that the court was authorized to require defendant, to purge himself of the contempt, to fill up the ditch.

In the district court for McLeod county judgment was entered in the case of Alfred H. Mills against Charles Senescall and seven other defendants; one of whom was Rudolph Hoefs, enjoining the defendants perpetually from constructing a certain ditch or in any manner interfering with the level of Cedar lake. Thereafter, upon the affi-

[1] Reported in 129 N. W. 583.

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davit of the plaintiff in that action, Rudolph Hoefs was brought before that court charged with contempt of court in violating that injunction, and after hearing before Morrison, J., was adjudged guilty. He then obtained from this court a writ of certiorari directed to the district court for McLeod county to review the judgment of that court. Affirmed.

H. H. Bonniwell and *C. G. Odquist,* for relator.

Sam G. Anderson, Jr., for respondent.

Brown, J.

Plaintiff owns property bordering upon a large meandered lake. Defendants Hoefs, Johnson, Radenz, Makedanz, Wendorf, and Falconer also own property bordering or in the vicinity of the lake; that of defendant Hoefs being located at the outlet thereof. In 1908 the defendants named entered into a contract with defendants Senescall Brothers for the construction of a ditch at the outlet of the lake, for the purpose of lowering the waters thereof and reclaiming adjoining low, swampy land. Whereupon plaintiff brought this action to restrain defendants from so doing, on the ground that the lowering of the lake would irreparably injure his riparian property rights, and plaintiff prayed for a permanent injunction restraining the construction of the proposed ditch. Issue was joined, and after a trial thereof judgment was on March 19, 1909, ordered and entered perpetually enjoining and restraining defendants, their agents or servants, from constructing said ditch, and from in any manner interfering with the level of the waters of the lake. The ditch proposed to be constructed by defendants, and to restrain which the action was brought, commenced at a point in the outlet of the lake a short distance beyond the meander line, in low, swampy land, and would have extended, if constructed, over and through land belonging to defendants.

Thereafter, on May 18, 1910, defendant Hoefs commenced the construction of another ditch at the same place, but commencing at a point upon his own land and without the meander line of the lake; the purpose being, as he claims, to collect the water at the outlet in one channel and to reclaim the adjacent marshy land. Plaintiff then

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presented to the court an affidavit charging therein a violation of the injunction of the court commanding defendant to forever refrain from the construction of a ditch at the point in question, and from in any manner interfering with the level of the lake, and prayed that defendant be proceeded against as for contempt of court. An order was then issued directing defendant to show cause why he should not be punished for contempt. After a full hearing thereon the court adjudged defendant guilty of contempt and imposed upon him a fine of $5, that he pay the cost and expenses of the contempt proceeding, including an attorney's fee of $25, and, further, that he fill up the ditch and restore the lake outlet to its natural condition. Defendant then sued out a writ of certiorari from this court to review the judgment so convicting him of contempt. The questions raised by defendant will be considered in the order presented in the briefs.

1. It is contended that the affidavit made the basis for the order to show cause is insufficient to give the court jurisdiction of the contempt proceedings, in this: That the facts stated do not show a violation of the injunction. The objection is not sustained. The affidavit, after reciting the entry of the judgment and the provisions thereof restraining defendant in the manner heretofore referred to states: "That the defendant, Rudolph Hoefs, in violation of said order and judgment, and in contempt thereof, on the 18th day of May, 1910, began and is now engaged in the construction of a ditch in the outlet of Cedar Lake, which said ditch now does lower and will greatly lower the waters of said Cedar Lake, and cause the waters thereof to recede to such an extent as to make said lake a shallow, stagnant bog, of no useful beneficial public use whatever." The affidavit is sufficient. The law does not require that it be in any particular form, nor that its allegations be as direct and specific in the statement of the facts constituting the contempt, as is required in an indictment. It is sufficient, though it states only the evidentiary facts. State v. District Court of Hennepin County, 65 Minn. 146, 67 N. W. 796; 1 Joyce, Injunctions, § 262.

2. It is further contended that the evidence wholly fails to show a violation of the injunction, because (1) that it was not made to appear that the ditch would lower the lake, and (2) that it was not

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made to appear that plaintiff, or other riparian owners, would be damaged thereby in their property rights. Neither of these contentions is well founded. It may be conceded that defendant had the right to construct the new ditch wholly upon his own land, provided the result thereof was not a lowering of the lake, and a resulting injury to plaintiff's property. But the evidence made the question whether the lake was or would be lowered one of fact for the trial court to determine. It is conflicting, and not so clearly against the conclusion of the trial court as to justify interference by this court. The question whether damage would result to plaintiff by lowering the lake was determined against defendant in the main action, and the judgment therein is conclusive in this proceeding that such would be the effect. Joyce, Injunctions, § 264.

Nor is it material that defendant may have acted in good faith, believing that he had the right to construct the ditch wholly upon his own land. If, as found by the court, the result of the ditch was an interference with the level of the lake, he violated the injunction, notwithstanding the fact that he believed, or was advised, that he had the right to construct the ditch upon his own land. Wilcox v. Schimmel, 59 Mich. 524, 26 N. W. 692; State v. Bowman, 79 Iowa, 566, 44 N. W. 813.

3. The judgment declaring defendant in contempt is in sufficient compliance with the rules of law controlling procedure in constructive contempt proceedings. The judgment must be construed in connection with the affidavit and the order to show cause, and need not recite all the facts there disclosed. 9 Cyc. 48; Joyce, Injunctions, § 284a; State v. Becht, 23 Minn. 411.

4. Defendant also complains of the punishment imposed. The court ordered defendant to pay a fine of $5, the cost and expense of the contempt proceeding, including $25 attorney's fees, and, to purge himself of the contempt, that he fill up the ditch and restore the outlet of the lake to its natural condition. Section 4640, R. L. 1905, provides that, before a fine exceeding $50 may be imposed for a constructive contempt, it must be made to appear that the right or remedy of a party to an action was defeated or prejudicial. Section 4649 provides that, when the prejudice or injury is shown, the court

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may, in addition to the fine, order the person guilty of the contempt to pay the aggrieved party a sum of money sufficient to indemnify him, "and satisfy his costs and expenses."

This was a proceeding for constructive contempt. The judgment in the action enjoined defendant from constructing a ditch at the outlet of the lake, or in any manner lowering the level of the waters thereof. The foundation of the judgment was that irreparable injury would result to plaintiff's property if the waters of the lake were lowered, and defendant was enjoined accordingly. He constructed the ditch, which, according to the evidence, and the conclusion of the trial court, adjudging him guilty of contempt, damaged and injured plaintiff's property. The prejudice to plaintiff's right was therefore shown, and the court was authorized to administer the punishment prescribed by section 4649. No evidence was offered showing the extent of the damage to plaintiff's property, and no indemnity was ordered paid. But his prejudice by the act of defendant did appear, and the court was authorized to require defendant to pay the "costs and expenses" of the contempt proceeding. Joyce, Injunctions, § 280. The statute vests in the court a wide discretion in matters of this kind, and to authorize it in a proper case to require the violator of an injunction to fully indemnify the aggrieved party, both with respect to damages suffered by reason of the wrongful act, and also to reimburse him for all proper and legitimate expenses incurred in bringing the wrongdoer to justice. Counsel fees were necessarily incurred in this behalf, and were properly included by the trial court. It does not matter that no evidence was offered upon the question of the value of the attorney's services. They were performed in the presence of the court, and the amount awarded, $25, cannot be said to be unreasonable or excessive. Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; Kingsley v. Anderson, 103 Minn. 510, 513, 115 N. W. 642, 116 N. W. 112. We discover no objection to the other items of expense allowed by the court sufficient to require special mention.

5. There can be no serious question of the power of the court to require defendant, to purge himself of the contempt, to fill up the ditch and restore the lake. Without this power the authority of the

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court in such cases, to compel respect to its judgments, would be impotent and without force or effect. Murphey v. Harker, 115 Ga. 77, 41 S. E. 585; Ashby v. Ashby, 62 N. J. Eq. 618, 50 Atl. 473; Joyce, Injunctions, § 281a.

Judgment affirmed.

JAGGARD, J., absent on account of illness.

FRANK URBAS v. DULUTH, MISSABE & NORTHERN RAILWAY COMPANY.[1]

January 27, 1911.

Nos. 16,759—(148).

Injury to child upon railroad crossing — complaint states cause of action.

Action to recover damages for injuries sustained by a child three and one-half years old by reason of the alleged negligence of the defendant in backing its car over a public highway crossing, whereby she was hit. The allegations of the complaint considered, and *held*, that they state a cause of action.

Action by Frank Urbas, the father of Agnes Urbas, an infant, in the district court for St. Louis county to recover $25,000 for personal injuries. From an order, Dibell, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Baldwin, Baldwin & Dancer, for appellant.

Samuel A. Anderson and *Warner E. Whipple,* for respondent.

START, C. J.

Appeal by the defendant from an order of the district court of the

[1] Reported in 129 N. W. 513.

[Note] Care required of railroad companies to prevent injuring small children upon the track, see note in 25 L.R.A. 784.

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county of St. Louis overruling its demurrer to the complaint, the here material allegations of which are to the effect following:

The plaintiff is the father of Agnes Urbas, an infant of the age of three and one-half years, who resides with him. He brings this action for her benefit. The defendant's railroad crosses at the surface a public highway at right angles at a point near the city limits of Eveleth and the home of the plaintiff. At all times before the accident and injury hereafter stated the public, including the plaintiff and his family, with the full knowledge and consent of the defendant, used its railroad track in going to and from the city and along and over the public highway. The defendant knew that people were likely to be upon its tracks and right of way near the public crossing at any time. On March 26, 1910, at about nine o'clock in the forenoon, the defendant ran one of its trains over the public highway and up to its station, about fifteen hundred feet from the public highway crossing, and then backed the train along its track to and over the public crossing. Agnes Urbas was then lawfully and rightfully upon such public crossing, and at and near the railroad track, where she wandered from her home, and where she was playing. She was then within the full view of the defendant's brakeman, who was standing upon the rear platform of the rear car, while the train was being so backed, at all times from the time the train left the station until it reached and passed the public highway crossing. While the train was still several hundred feet away, and while it was so backing with its employee upon the rear platform, the child Agnes was at all times in full view of him, and it was then and there evident to any one exercising ordinary care that she was too young to appreciate the purposes and object of any signal that was being given. She was then at the crossing upon the same and quite near the track. When the train was from one hundred to two hundred feet away, the child wandered onto the railroad track and directly in the path of the backing train. The defendant's employee on the rear platform then and there saw, or in the exercise of ordinary care could and should have seen, that the child was in a place of great danger, and was likely to be hit by the backing train, and saw, or in the exercise of ordinary care and

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prudence could and should have seen, that she did not know of or appreciate the danger threatening her, and that she was likely to be upon the track as the train reached and passed the highway crossing, and to be hit and injured. The defendant, through its employees, and particularly the one on the rear platform, negligently continued backing the train without slackening the speed thereof, while the child was in imminent danger, although the defendant then knew, or in the exercise of ordinary care could and should have known, that the child did not know or appreciate what the purposes and objects of the signals then given were, or of the approaching danger. The defendant carelessly, negligently, and wrongfully ran over her, and thereby so hurt and injured her as to necessitate an amputation of her left arm at the shoulder joint. The defendant did then and there carelessly, negligently, and wrongfully fail to stop the train, although it had ample time to have done so, and avoid the accident and injury, by the exercise of ordinary care, and carelessly, negligently, and wrongfully failed to make any effort to stop said train or car, but simply continued to back the train in the manner described, in the hope or expectation that the child would get off the track in time to avoid being hit by the train, although the defendant saw and knew, or by the exercise of ordinary care it could and would have seen and known, that the child was likely to be and remain upon said track and be hit by said train.

The allegations of the complaint are prolix, indefinite, and in some respects inconsistent; but such defects cannot be reached by demurrer. It is here urged by defendant that the complaint shows that the child was a trespasser upon its right of way, and therefore it owed her no duty until it actually discovered her in a position of peril. The cases of Erickson v. Great Northern Ry. Co., 82 Minn. 60, 84 N. W. 462, 51 L.R.A. 645, 83 Am. St. 410, and Ellington v. Great Northern Ry. Co., 96 Minn. 176, 104 N. W. 827, relied on in this connection, are not in point; for the place of the accident in each case was the exclusive right of way of the defendant, and not, as in this case, a public highway. The allegations of the complaint, liberally construed, state a cause of action; for they show that the accident occurred in a public highway, and they do not

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show that the child was a trespasser therein. The defendant was bound to know that men, women, and children were liable to be upon the public highway, and in backing its cars over the public crossing it was bound to be on the lookout and exercise due care to avoid injuring them. 33 Cyc. 756; Strutzel v. St. Paul City Ry. Co., 47 Minn. 543, 50 N. W. 690; Krenzer v. Pittsburg, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. 252; Johnson v. Reading City, 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. 752.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

STATE ex rel. G. W. GRIGGS and Another v. DISTRICT COURT OF DAKOTA COUNTY and Another.[1]

January 27, 1911.

Nos. 16,811—(43).

City of South St. Paul — assessment for local improvement.

By its charter the city of South St. Paul is authorized to levy assessments for local improvements, including curb and sidewalk, and the initial step required to bring a particular improvement within the scope of that authority is a resolution of the city council, duly passed, ordering the same to be made. The subsequent proceedings in awarding a contract for the carrying on of the improvement do not involve the authority to order the improvement, within the meaning of the charter provision that in the action for judgment on the assessment "no objections shall be interposed or sustained in relation to any proceedings prior to the confirmation of the assessment, except that the council had no authority to order the said improvement."

Same — irregularity in award of contract.

Upon the application for judgment in the district court on the assessment levied by the city council for an authorized improvement, irregularity in awarding the contract for putting in the improvement, not shown to

[1] Reported in 129 N. W. 585.

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have resulted in injury to the property owner, is not ground for the setting aside of the assessment levied therefor by the city council.

Writ of certiorari to review a proceeding in the district court for Dakota county, wherein the city of South St. Paul made application for judgment for assessments levied against certain lots of the relators described in the proceedings. The application was heard by Crosby, J., who ordered judgment against the lots. Affirmed.

Walter L. Chapin, for relators.

H. J. Goodwin and *W. R. Duxbury,* for respondents.

SIMPSON, J.

Against relators' objections, judgment was entered in the district court against certain lots owned by relators for an assessment levied thereon by the city of South St. Paul to defray the cost of sidewalk and curb. The proceedings in the district court are certified to this court for review of such judgment.

The city of South St. Paul, by its charter, is authorized to levy assessments for local improvements, including sidewalks and curbs, and the initial step required to bring within the scope of this authority any particular improvement is the adoption of a resolution by the city council ordering the same to be made, which resolution, if it includes the construction of curb, must be preceded by a written application therefor to the city council and a determination by that body, upon consideration of the application, that the improvement is proper and necessary, and that real estate may be found that will be benefited to the extent of the damages. The objections to the present assessment are not based on any failure to take this initial step. A written application was made, and a resolution ordering the work passed by the council. This resolution included curb in the work ordered only by reference to the written application; but it was considered and treated by the city officials as including curb, and its sufficiency in that respect is not assailed. State v. District Court of Ramsey County, 51 Minn. 401, 53 N. W. 714; State v. District Court of Ramsey County, 47 Minn. 406, 50 N. W. 476.

The subsequent proceedings of the city council in doing this work

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under contract did not comply with the provisions of the charter. Under the charter a different provision is made for constructing sidewalks than that for constructing curb in respect to the manner of contracting for doing the work. As to sidewalks—at the beginning of the season a general contract is entered into for laying all sidewalk that may be ordered during the season. As to curb—the charter provides for a contract being let, after the improvement is ordered, for making of that improvement. In the present case, at the beginning of the season of 1907 a contract was attempted to be made for constructing cement sidewalks and curb such "as may be, from time to time, ordered and directed by the city council of South St. Paul during the year 1907." This contract was awarded and its execution authorized by a committee of the council. The council recognized its existence by approving the contractor's bond and by levying an assessment for work done under it. The contract was therefore defective, both as to the manner in which it was awarded and as to the unauthorized inclusion in the contract of curb to be thereafter ordered. In pursuance of the terms of this contract, made in March, 1907, the curb and sidewalk in front of relators' property, ordered August 5, 1907, were constructed.

Thereafter, upon notice duly given, the council levied an assessment to defray the combined cost of such curb and sidewalk, and thereupon the council caused notice to be given, in accordance with the charter provisions, of the completion of said assessment and of a meeting of the council to hear objections thereto, and that objections must be filed in writing at least one day prior to the meeting, and that, unless sufficient cause is shown to the contrary, the assessment would be confirmed. It is not made to appear that any written objections were filed to the assessment. At the specified meeting, the assessment was confirmed by the council.

The assessment was thereafter duly brought before the district court for judgment. The charter under consideration provides that upon the hearing in the district court, upon application for judgment, "no objections shall be interposed or sustained in relation to any proceedings prior to the confirmation of the assessment, except that the council had no authority to order the said improvement, and

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no objection to any other of the proceedings shall be sustained on any mere formal irregularity or defect."

The city clearly had authority to make the improvement here involved. The city charter confers general authority to make improvements of this class, and the charter provision was made applicable to this particular improvement by the resolution of the council ordering the improvement made, passed after the steps prescribed by the charter as requisite to its due passage had all been taken. It is the absence of the initial step prescribed for bringing a particular improvement within the charter grant of power that renders work done unauthorized. This is the extent of the rule laid down in State v. Bury, 101 Minn. 424, 112 N. W. 534, and Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053.

Under this charter an assessment for curb may be levied before the work is done or a contract awarded. Compliance with the charter provision as to contracting for the work is not made a prerequisite to levying a valid assessment for curb. The provisions of the charter prescribing a method for letting contracts and doing work do not go to the jurisdiction of the council over the making of the improvement and levying an assessment therefor, and hence it is competent for the same legislative authority that prescribes the method to be pursued in carrying on the work to limit the effect of a departure from that method, to the extent at least that such irregularity should be disregarded, unless it affects the property owner injuriously. To so limit the effect of irregularities such as are here involved is the manifest purpose of the provision of the charter above quoted. State v. District Court of Ramsey County, 33 Minn. 164, 22 N. W. 295; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769; Dousman v. City of St. Paul, 23 Minn. 394.

From the record before us it appears that, at the time the contract complained of was awarded for constructing cement sidewalks and curb, another bid was submitted to the council for doing the same work, and in such other bid the price for laying cement walk was lower. The claim is made on behalf of the relators that it appears from these bids that the cost of the improvement placed in front of their lots was increased by the work being done under the irregular

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contract complained of. While this appears to be the case as to sidewalk, on the face of the bids it would appear that the bid the council committee accepted was substantially lower for curb. No evidence was submitted showing that the combined cost of the curb and sidewalk, under the bid accepted, was in excess of what the combined cost would have been under the other bid, or that it was greater than the reasonable cost of the improvement. It does not appear, therefore, that upon a reassessment being made the amount properly assessable against relators' property would be less than the present assessment, or to what, if any, extent the relators have been injured by the irregularities complained of. The objections here made are of the class that the charter provides shall not be sustained by the court upon the application for judgment on the assessment.

Whether, in view of the requirement that notice of the meeting of the council for the confirmation of assessments is required to be given, and that objections to the confirmation are required to be filed in writing prior to such meeting, an objection can be first made in the district court that irregularities in proceedings not jurisdictional have increased the assessment upon property was not discussed by counsel. Because it does not appear in this case that the irregularities complained of have increased the assessment, it is not necessary to determine whether such objection was open to relators; they having filed no objections to the confirmation of the assessment by the city council.

There appearing to be no error in the proceedings in the court below, the judgment is affirmed.

JAGGARD, J., took no part.

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WESTERN LAND SECURITIES COMPANY v. DANIELS-JONES COMPANY.[1]

January 27, 1911.

Nos. 16,878—(210).

Breach of contract — evidence.

In an action to recover damages for the breach of an executory contract for the sale of land, it is *held* that the evidence is sufficient to sustain the verdict of the jury to the effect that defendant unconditionally repudiated the contract, and refused to perform the same, and that the damages awarded are not excessive.

Incompetent evidence.

Incompetent evidence, if material, is sufficient to establish a fact in issue, when received without objection.

Charge to jury.

There were no errors in the instructions to the jury.

Action in the district court for Ramsey county to recover $16,000, damages for breach of a contract for the sale of a section of land in North Dakota made by defendant's assignor to plaintiff's assignor. The facts are stated in the second paragraph of the opinion. The answer alleged that the contract was terminated, pursuant to the statutes of North Dakota, prior to the commencement of the action and plaintiff had knowledge of the termination proceedings prior to the taking of the assignment, but tendered performance to plaintiff, if it was legally entitled to such performance. The case was tried before Hallam, J., and a jury which returned a verdict in favor of plaintiff for $3,272.19. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Jesse Van Valkenburg and *George S. Grimes,* for appellant.

B. H. Schriber, for respondent.

[1] Reported in 129 N. W. 508.

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BROWN, J.

Action to recover damages for the alleged breach of an executory contract for the sale of land. Plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

It appears that Daniels and Jones were the owners of the land involved in the action, and some time prior to April 3, 1908, they entered into an executory contract for the sale thereof, with other lands, to Stark and McLane. On April 3 Stark and McLane entered into an executory contract for the sale of the particular land here in question to Cass. Subsequently Stark and McLane formed a corporation, known as the Stark & McLane Land Corporation, and the executory contract just mentioned was by Stark and McLane assigned and transferred to the corporation. The land corporation was unable to carry out the executory contract with Daniels and Jones, and it was released therefrom. As a part of the negotiations for such release the land corporation assigned and transferred the Cass contract to defendant, Daniels-Jones Company, a corporation formed by the original vendors of the land, Daniels and Jones, and that company thereby became the vendor in the Cass contract. Thereafter Cass assigned the contract to plaintiff, and plaintiff thereby became the vendee and assumed the obligations thereof. The complaint alleges that defendant thereafter repudiated the contract, and refused, upon tender of performance by plaintiff, to perform the same. Whether defendant did repudiate the contract and refuse performance thereof was the principal issue of fact litigated on the trial below. Defendant's assignments of error in this court will be considered in the order presented in the brief of counsel.

1. It is contended that under the terms of the contract of sale plaintiff was limited, in an action for breach thereof, to specific performance, or the recovery of the amount paid upon the purchase price of the land. In this we do not concur. The contention is based upon the following clause of the contract, namely: "In case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same, and he shall so refuse the same upon that ground, *or the owner refuses to accept sale,*

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the vendor shall not be liable for any damage, and the sum of $640 paid by the purchaser shall be returned to him." The point made is based upon the clause that no damages shall be recoverable if "the owner refuses to accept sale."

This form of contract was evidently prepared for the use of selling agents, and the provision of the contract referred to was designed to protect the agent in case his principal refused to accept or approve the contract of sale. But, however construed, it can have no application to the case at bar. The vendors in this contract were the owners of the land, and they entered into the contract for the sale thereof. They thereby "accepted sale," within the meaning of the contract.

The further point, in this connection, that defendant, assignee of Stark and McLane, is not liable in damages for a breach of the contract, is not sound. By the acceptance of the assignment, and payment of an instalment of the purchase price, defendant assumed the obligations of the contract and stands in the position of vendor.

2. It is also claimed that there was no such repudiation of the contract by defendant as entitles plaintiff to damages. It appears that subsequent to the assignment of the contract to the defendant there was an attempt to cancel the contract, under the statutes of North Dakota, where the land is situated, for the failure of the vendee to make payment of instalments due upon the purchase price. The statutes were not complied with, and the proceedings for cancellation were ineffectual.

It also appears that defendant sold and conveyed a part of the land, by warranty deed, to one Kruse, and that Kruse executed a mortgage thereon to defendant for the purchase price. Kruse subsequently reconveyed to defendant, and the mortgage was discharged of record. It also appears that subsequent to this reconveyance defendant conveyed the land to one Walton for the consideration of $12,000. It does not appear whether Walton ever reconveyed to defendant. In January, 1910, plaintiff tendered to defendant the whole amount of the unpaid purchase price of the land, with interest, and demanded a conveyance of the land. Defendant refused to accept the money or deed the property. Previously, in an interview

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with plaintiff's attorney, defendant refused to recognize the contract as in force, and declared that it had been canceled.

While it is true that the complaint charges a breach of the contract, or rather a repudiation thereof, in two respects only, namely, the conveyance of the land to Kruse, and the refusal of the tender, evidence tending to show all the facts just referred to, including the conveyance to Walton, was received without objection on the trial, and was therefore properly submitted to the jury. An objection to the evidence tending to show the Walton conveyance was made to the concluding question put to the witness, and was sustained upon the ground that the question had already been answered. There was no motion to strike out the other testimony. The deed was excluded, but whether upon the ground that the copy offered was not sufficiently authenticated, or was immaterial under the pleadings, does not appear. But the evidence, though incompetent, was received without objection, and therefore sufficient to prove the fact. Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L.R.A.(N.S.) 729.

The evidence taken as a whole, which is not challenged by the assignments of error, was clearly sufficient to justify the conclusion that defendant unconditionally repudiated the contract and refused to perform the same, thus entitling plaintiff to damages. It is quite probable that defendant's refusal was predicated upon the theory that the contract had been lawfully canceled and terminated for the default in payments by the vendee. And, though the vendee's default clearly appears, defendant was in error. The contract had not been canceled, the proceedings taken for that purpose were insufficient, and at the time the tender of the purchase price was made by plaintiff, it was a valid and enforceable contract. Matteson v. U. S. & C. L. Co., 103 Minn. 407, 115 N. W. 195; Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

The mere conveyance of the land by the vendor in a contract like that at bar to some third person would not, perhaps, standing alone, amount to an unqualified repudiation of the contract. Duluth L. & L. Co. v. Klovdahl, 55 Minn. 341, 56 N. W. 1119. But such a conveyance, coupled, as in the case at bar, with a refusal to further

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recognize the rights of the vendee, and an unconditional refusal to perform, clearly would constitute a breach entitling the vendee to his remedy. Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787. Nor does the fact that Kruse reconveyed the property to defendant render the evidence unimportant. It tended to disclose defendant's attitude toward the contract, and that its officers regarded it as having been canceled and at an end. Nor does the fact that plaintiff's tender did not include the full amount of interest to which defendant was entitled defeat the right of action. The tender was not refused on the ground that it was insufficient, but upon the ground that the contract was not then in force.

3. There was no error in calling the attention of the jury to the Walton conveyance, or in permitting witness Rogers to testify concerning the value of the land. The evidence of the Walton conveyance was, as already pointed out, received without objection, and was therefore properly before the jury. In matters respecting the competency of witnesses on the subject of the value of property, the trial court is vested with a wide discretion, in the exercise of which in this case we discover no abuse.

4. The damages awarded plaintiff are large, and were probably based upon the highest estimate given by the witnesses of the value of the land. The question whether an excessive amount was awarded was one peculiarly for the trial court. We discover in the record conflicting opinions upon the question; but the evidence is not so palpably against the verdict as to justify this court, in the face of the approval of the trial court, in setting it aside.

Order affirmed.

JAGGARD, J., took no part.

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JOHN C. LATZKE v. CHRIS ALBRECHT and Another.[1]

January 27, 1911.

Nos. 16,879—(236).

Contract to buy land on shares — consideration for promissory note.

The contract between the parties set out in the opinion constitutes a valuable consideration for the promissory note which is the subject-matter of this action.

Action in the district court for Scott county to recover $2,960 upon a promissory note. The facts are stated in the opinion. The case was tried before Morrison, J., who made findings of fact and as conclusion of law ordered judgment in favor of plaintiff for $3,581.60. From the judgment entered pursuant to the order, defendants appealed. Affirmed.

E. Southworth and *W. N. Southworth,* for appellants.

Jesse Van Valkenburg, for respondent.

START, C. J.

This is a joint appeal by the defendants from a judgment of the district court of the county of Scott against them and in favor of the plaintiff.

The complaint herein alleged that the defendants, on August 1, 1907, executed to the plaintiff their promissory note of that date, and thereby for value received promised to pay to the order of the plaintiff $2,960, two years after date, with interest at six per cent. per annum until paid. The answer was to the effect that the defendant Thresa Albrecht signed the note at the request and for the accommodation of her husband and codefendant, without consideration, and that he executed the note without any consideration therefor. The answer also alleged the circumstances under which it was claimed the note was made. The allegations of new matter in

[1]Reported in 129 N. W. 506.

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the answer, except as therein admitted, were put in issue by the reply. The cause was tried by the court without a jury, and findings of fact made to the effect that the note was executed for a valuable consideration, and as a conclusion of law judgment was directed for the plaintiff for the amount of the note.

The sole question here to be decided is whether there is any evidence fairly tending to support the finding that the note was given for a valuable consideration. There was evidence, taking the most favorable view of it for the plaintiff, which is permissible, tending to show the evidentiary facts following:

The defendant Chris Albrecht, hereafter referred to as the defendant, was agent for the sale of Canadian lands, and he and the plaintiff entered into an agreement for the purchase of section 27, township 5, range 5, in the province of Saskatchewan, for $5,920. The plaintiff was to furnish the money for that purpose and take the title in his own name, the defendant to do the work, and the profits were to be divided between them. The land was conveyed to the plaintiff, and he paid the purchase price therefor, $5,920; and on July 23, 1906, the parties entered into a written contract touching the matter, which was duly signed and acknowledged by them. The contract, so far as here material, is to the effect following:

John C. Latzke, the party of the first part, has purchased from the American Canadian Land Company the following described land, to wit: All of section No. 27 in township No. 5, range No. 5, Saskatchewan, Canada, and has paid the company therefor the sum of $5,920. The title to the land runs to the party of the first part. Now, therefore, it is hereby mutually agreed that, the land having been so bought by the first party and the purchase price therefor having been paid by him, each of the parties hereto shall be joint owners of the land, and the second party, Chris Albrecht, shall pay to the first party interest on one-half of the purchase price, to wit, on $2,960, at the rate of six per cent. per annum, interest payable annually until such time as the land may be sold. It is further understood that the second party shall use his best endeavors to sell the land as soon as possible, and shall have the sale thereof, and when the land is sold the amount of the purchase money so paid by the

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first party shall be repaid to him out of the sale, and that all profits over and above the sum of $5,920 so paid for the land shall be divided equally between the parties hereto. It is also agreed that the parties hereto shall pay all taxes on the land, until sold, equally, and shall stand all expenses of recording papers and other actual expenses equally. It is also agreed that in the selling of the land the second party shall use his best judgment, but not at a less price than paid therefor, except by the consent of both parties. The first party shall make the proper conveyance of the land so sold, and the first party shall receive the full amount of his purchase price paid, before there shall be any profits to divide.

The note in question was given in renewal of the one which was executed in consideration of the interest of the defendant in the land, as expressed in the contract, and for one-half of the purchase price thereof. On February 15, 1907, the plaintiff, with others, entered into a contract for the exchange of section 27 for other lands with Messrs. Harvey & Hepburn, whereby section 27 was to be accepted at the agreed price of $9,600 as part of the purchase price of the other lands. The plaintiff deeded the section according to the contract, which was negotiated by the defendant. The plaintiff never received any money for the section, or the land which was to be conveyed to him by Harvey & Hepburn. On the contrary, at the time of the trial of this action a suit was pending and undecided, to which the plaintiff was a party plaintiff, to compel a reconveyance of the section to him.

Do these evidentiary facts justify the finding of the ultimate fact by the trial court that the note was given for a valuable consideration? This question depends upon a construction of the contract between the plaintiff and the defendant. If that contract gave the defendant any interest in the land, it constituted a valuable consideration for the note, and the judgment must be affirmed; for the defense is no consideration for the note, not a failure of consideration or payment.

It is claimed by the defendant that, at the time the contract was executed, he executed his promissory note for one-half of such purchase price, viz., $2,960, merely as a memorandum of the amount

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upon which interest should be figured, and to show that he was not to have one-half of the whole amount received upon a resale of this land. The contract and note, when read together, do not justify this claim. There was neither necessity nor sense in giving the note simply as a memorandum of the amount upon which interest should be figured, for that was specifically provided for in the contract. Again, the note is not a promise to pay the amount thereof when the land is sold and interest to that time, but is an absolute promise to pay, with interest, $2,960, one half of the purchase price of the land, two years after its date. The contract states that the title to the land was in the name of the plaintiff, and the parties thereby expressly agreed that, the land having been so bought by the plaintiff and the purchase price paid by him, the parties shall be joint owners of the land. The contract then provides for the payment by the defendant of one-half of the interest on the purchase price until such time as the land may be sold, and also that the defendant shall have charge of its sale, and the plaintiff shall make a deed of the land when sold, and receive the full amount of the purchase price before there should be any profits to divide. It is clear from the contract that the parties anticipated and assumed that the land could be sold for a profit and the purchase price repaid from the proceeds of the sale. This, however, in no manner qualifies the clear and positive agreement that the parties should be joint owners of the land. The contract admits of no other reasonable construction, and it constitutes a valuable consideration for the note given for one-half of the purchase price.

Judgment affirmed.

JAGGARD, J., took no part.

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DOMINIC SPINO v. BUTLER BROTHERS.[1]

January 27, 1911.

Nos. 16,912—(228).

Injury in exploding dynamite — safety of method — questions for jury.

Action to recover for personal injuries sustained by the plaintiff while in the service of the defendant by its alleged negligence, in that its method of exploding dynamite was unsafe, and that it failed to instruct and warn him as to the hazards of the work. Verdict for him. *Held*, that the question whether the method adopted was a safe one was a subject for expert evidence; that the defendant's negligence, the contributory negligence of the plaintiff, and whether he assumed the risks, were each made by the evidence a question for the jury; that the verdict is sustained by the evidence; and that there were no reversible errors in the rulings of the trial court as to the admission of evidence or in its charge to the jury.

Action in the district court for St. Louis county to recover $15,500 for personal injuries. The facts are stated in the opinion. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for $5,000. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Trafford N. Jayne, for appellant.

Alexander Marshall and *Theodore Hollister,* for respondent.

START, C. J.

On May 21, 1909, the plaintiff commenced to work for the defendant, a corporation which was then engaged in stripping an iron mine known as the La Rue. He worked with the track gang until June 1, 1909, and on that day he was put to work in the pit "gopher holing," so called, which was accomplished by drilling a hole horizontally into the bank, charging it with dynamite or powder, attaching a fuse, and exploding the charge. On the morning

[1]Reported in 129 N. W. 590.

[Note] Duty to warn or instruct servant, see note in 44 L.R.A. 33.

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of June 25, next thereafter, while he was attempting to explode a charge, sand and other substances were thrown into his face and eyes by an explosion, which totally destroyed the sight of one of his eyes and partially that of the other, and otherwise seriously injured him.

He brought this action in the district court of the county of St. Louis to recover damages on account of the injuries so sustained on the ground of the defendant's alleged negligence, in that the system employed by it in exploding the dynamite was unsafe and that it negligently failed to instruct the plaintiff and warn him of the hazards of doing the work in the manner and with the instrumentalities furnished. The answer admitted that the plaintiff was injured while doing such work, but denied the allegations of the complaint as to its negligence, and alleged that the plaintiff was fully informed and appreciated the risks of his employment, and that his injuries were solely caused by his own negligence. The defendant at the close of the evidence moved the court for an instructed verdict in its favor, which was denied. A verdict was returned for the plaintiff in the sum of $5,000, and the defendant appealed from an order denying its blended motion for judgment notwithstanding the verdict or a new trial.

1. The primary question to be considered is whether the court erred in denying the defendant's motion for an instructed verdict; for, if so, the motion for judgment ought to have been granted. It is the claim of the defendant that the court did so err, for the reason that there was no evidence to sustain a finding that the defendant was negligent, and, further, that it conclusively appears from the evidence as a matter of law that the plaintiff was guilty of contributory negligence and assumed the risks.

There was evidence, taking the most favorable view of it for the plaintiff, tending to show these facts: The plaintiff is an Italian laborer twenty-four years old. He had worked in iron mines on the Range eight or nine months before he entered the service of the defendant, but prior to that time he had never drilled and exploded any gopher holes, and had never before seen the method used which the defendant employed. When he was set to work in the pit at

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"gopher holing," he was told by the boss how to do the work, and he did it the same way which he had been told, and was so doing it at the time he was injured. As to the length of the fuse to be used, he was told to do as the others did, and not to use a long fuse, because it took too long to explode the blast. He followed the instructions, and used the same length of fuse, about eighteen inches long, which was white and the size of a pencil, as he saw other men using for the same purpose. The fuse would burn a foot in a minute. He knew that when the blast exploded it was liable to throw out sand and gravel, and appreciated that it was dangerous to stand in front of the hole when a blast exploded. At the time he was injured he and his partner—that is, his fellow workman—had the gopher hole dug about twelve feet into the bank. It was about a foot in diameter. The hole was just big enough to work with a shovel. When he was injured he was trying to find the fuse to light it, and was looking into the hole for that purpose. There were two and one-half sticks of dynamite in the little hole at the back or farther end of the gopher hole, and attached to the dynamite was a piece of fuse about a foot or one and one-half feet long, one-half of which stuck out into the big hole from the little one. He was trying to light this fuse with a candle tied on a stick about fourteen or fifteen feet long, which were furnished by the pit boss who was over the work that they were doing at the time. He put the stick with the candle at its end into the hole to light the fuse. While he was trying to light the fuse, the blast went off before he knew it. He was never told that there was any danger in firing the blast with the pole and candle; nor did he know that there was any danger in doing the work as he was told to do it. When he got the lighted candle into the gopher hole, he could not see—it was too dark—and he could not tell whether he was holding the candle blaze at the end of the fuse, or whether it was further back. Nor did he know, until the blast exploded, which was about a minute and one-half after he put the candle in, that the candle had lighted the fuse, because he could not see, and before he knew that the fuse was lighted the blast went off and injured him. At the time he was injured he was looking into the hole trying to locate and light the

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fuse. The blast which injured plaintiff was the first one exploded that morning, the hole having been drilled and charged the evening before. The hole was dark and smoky. The smoke was blown into the hole by the wind, from a steam shovel working about thirty feet away. At times before the accident the plaintiff and his partner would wait awhile, when smoke got into the hole, for it to get out before lighting the fuse. The reason they did not do so on the morning in question was that the boss did not want them to wait very long, and on the evening before the boss became offended because they waited so long in firing holes, and told them to "fire when it is time to fire; don't stand still." The defendant had provided a battery with necessary appliances by which the blast could be exploded, and the plaintiff knew how to use it; but he had been instructed to use it only when the hole was fifteen or more feet in length.

The evidence was conflicting in many material respects, and our statement of the evidentiary facts which the evidence tended to prove is based largely upon the plaintiff's testimony, for its credibility was a question for the jury. The question of the defendant's negligence was made by the evidence one for the jury, and the verdict in this respect is amply sustained by the evidence. The questions of the contributory negligence of the plaintiff and of his assumption of the risks are, by the evidence, in this particular case closely united, although they are in principle distinct.

The most serious question presented by the record is whether the question of the assumption of risks was one for the jury or for the judge. The burden was on the defendant to establish this defense. The question is always one of fact for the determination of the jury, unless the evidence is conclusive that the employee assumed the risks; that is, whether the undisputed evidence is so clear and convincing that fair-minded men can reasonably draw but one conclusion. In such exceptional cases it is the right and duty of the court to determine the conclusion and instruct the jury accordingly. The question cannot be determined from the point of view of the court room and by a strict adherence to the principle that every man must look out for himself, but from the point of view of those

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who are compelled by necessity to engage in dangerous occupations and do as they are told.

The plaintiff in this case must be held to have known and appreciated the fact that if his lighted candle came in contact with the fuse it would explode the blast, and that if the fuse was lighted without his discovering it he likely would be seriously injured. This, however, is not the test; for the question is: Did he know and appreciate the danger of the fuse being ignited without his discovering it before the blast would explode? Does the undisputed evidence so clearly and conclusively establish the fact that he did so know and appreciate that fair-minded men cannot reasonably draw any other conclusion from the evidence? The plaintiff was justified in assuming, until otherwise advised, by his observation and experience, that the defendant's method of doing the blasting, its instructions and orders were safe, and that it was his duty to follow them. If his testimony is correct, he did only what he was directed to do. He was told not to use the battery unless the hole was fifteen feet in length, and to use the pole and lighted candle as he did. He was admonished to hasten his work, and to use short fuse, and not to wait too long before firing. Is it conclusive, from a consideration of all the conditions under which he was doing his work, as disclosed by the evidence, including his experience and the instructions and orders received by him, that he must have known and appreciated the danger of the fuse being lighted without his knowledge?

We are of the opinion that whether such was the case was made, by the evidence, a question for the jury, and not for the judge. We also hold that the question of his contributory negligence was also one to be decided by the jury, under proper instructions. It follows that the motions for a directed verdict and for judgment were properly denied.

2. This brings us to the question whether there were any reversible errors made on the trial which entitled the defendant to a new trial. The plaintiff called a witness who had had some ten years' service and experience in working at the business of stripping mines on the Range in different capacities, from steam shovel foreman to

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superintendent. He testified generally as to the methods in use to explode dynamite in the work of gopher holing. He had never used nor seen used the defendant's method. He was then asked a hypothetical question, which recited the facts as to the method used by the defendant which the plaintiff's counsel claimed there was evidence to show, and concluded as follows: "What would you say as to whether, in your opinion, that was a safe and proper method of firing the gopher hole?" The only objection to the question was this: "Objected to as incompetent and no foundation laid." The objection was overruled, and the witness answered that he would not consider it safe.

The ruling is here urged as error, because the question did not embody substantially all the facts which the evidence tended to show as to the defendant's method. No such objection was made in the court below, and it cannot be here made for the first time; for if it had been made on the trial, and there was any merit in it, the omission in the question would have been supplied. Frigstad v. Great Northern Ry. Co., 101 Minn. 40, 111 N. W. 838.

It is further urged as a reason why this ruling was error that the subject-matter of the inquiry was not intricate, but easily understood by laymen without the assistance of opinion evidence; that the question called for an opinion upon a matter which it was the province of the jury to decide; and, further, that the witness was incompetent, because he had never used nor seen defendant's method. Expert evidence is admissible whenever the subject of inquiry is such that, in the judgment of the trial judge, persons not versed therein are liable to prove incapable of forming a correct judgment in the premises without such aid. It is not an objection to such evidence that it bears directly upon the issue to be determined by the jury. The trial judge has a wide discretion in the application of the rule. The competency of a witness offered as an expert is a question addressed to the sound discretion of the trial judge. Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665; Beardsley v. Minneapolis St. Ry. Co., 54 Minn. 504, 56 N. W. 176; Sieber v. Great Northern Ry. Co., 76 Minn. 269, 79 N. W. 95.

We are of the opinion that the witness was competent. The mere

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fact that he had never, in his extended experience, used or seen used the alleged unsafe method used by the defendant, did not disqualify him; for, otherwise, no witness, however skilled or experienced, would be competent if he had not seen used, or himself used, an alleged unsafe method. The court did not err in holding that expert evidence was admissible on the question.

Several other alleged errors are assigned and urged. They relate to the rulings of the trial court as to the admission of evidence, and its instructions to the jury, and refusal to give requested instructions. We have considered each of them, and find no reversible error in any of them.

Order affirmed.

SIMPSON, J., dissents.

JAGGARD, J., took no part.

RASMUS A. JACOBSON v. W. E. McCULLOUGH and Others.[1]

January 27, 1911.

Nos. 16,914, 16,915—(247, 248).

Failure of project — right to return of subscriptions.

The rule that contributors to a fund, the purpose of which has failed, are entitled to return of their respective contributions, applied to two of the parties herein, who paid money "on account" of their interest in a proposed corporation never organized. Because the extent of their interest in the proposed corporation was not agreed upon, but was a subject of disagreement, they acquired no ascertainable interest in the proceeds of a contract entered into by the other two parties herein, though such contributions were used to perform, in part, the contract, and though the contracting parties intended to turn the contract over to the corporation when organized.

[1]Reported in 129 N. W. 759.

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Parties to contract were partners.

Under the evidence, the two parties herein making such contract were and are copartners in the performance of the contract, and as such are entitled to share equally in the proceeds.

Action in the district court for Ramsey county against W. E. McCullough, Arthur G. Cheney, Rasmus J. Gjerde, Timothy Foley, M. B. Foley, P. Welch and J. W. Stewart, to restrain defendants Foley, Welch and Stewart from paying over any money due upon a certain contract to defendants McCullough, Cheney or Gjerde; that the pretended claim of these defendants to any partnership interest in plaintiff's business be determined; that they be adjudged to have no interest therein, and that defendants Foley, Welch and Stewart be directed to pay plaintiff the balance due upon a certain railroad construction contract; that plaintiff have judgment against defendant McCullough for $5,000, amounts collected by him from defendants Foley, Welch and Stewart, less the sum of $2,000; and that plaintiff be adjudged to pay to defendants the amount paid into a certain proposed corporation. The facts are stated in the opinion.

In their separate answer defendants McCullough and Cheney alleged that McCullough put in $2,200 in cash, and that plaintiff furnished equipment to the value of about $3,000; that on June 21, 1909, McCullough, who was a civil engineer, entered upon the performance of the contract and devoted his entire time and attention thereto until it was completed. The answering defendants asked that plaintiff be adjudged to be their partner and that the partnership be wound up. In his separate answer defendant Gjerde admitted that he had a verbal understanding with plaintiff and defendant McCullough to form a corporation to take over the business and assets of plaintiff, and that in good faith for the purpose of becoming a stockholder in it, he had paid over the sum of $2,000, which had been used in the business of the corporation; admitted that McCullough and Cheney contributed to the capital stock of the corporation, but denied that he had refused to carry out the contract and demanded that the season's profits be determined.

The case was tried before Bunn, J., who made findings of fact, and as conclusions of law found that plaintiff and defendant Mc-

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Cullough were equal partners in the enterprise; that defendants Gjerde and Cheney were not partners; that the purposes for which the partnership was formed had been fulfilled and a full settlement should be had, and to that end an accounting of the partnership affairs should be had; that plaintiff and defendant McCullough should be enjoined from collecting any part of the sum in the hands of Foley, Welch and Stewart belonging to the partnership, and from selling any of the personal property belonging to the partnership; that the outfit owned by plaintiff prior to June 21, 1909, was his own property and not partnership property; that a receiver should be appointed, to take possession of all personal property belonging to the partnership, to collect all moneys due the partnership, pay all debts thereof, if any, to sell all such personal property and to make report to the court of his doings as such receiver; that after such accounting was had, and all the assets collected and reduced to cash and its debts, if any, paid, the balance was to be distributed as follows: The sum of $2,000 to defendant Gjerde, with interest on said sum from July, 1909; $1,000 to defendant Cheney with interest from 1909; plaintiff to have the balance, if any, he was found on said accounting to have contributed to the enterprise, including $2,500 allowed him for the use of his outfit, over and above the sums received by him out of the proceeds of the contract, the balance to be divided equally between plaintiff and defendant McCullough, charging plaintiff with the balance, if any, of the amounts drawn by him over and above the amounts contributed by him, as shown by the accounting, and charging McCullough with the $5,000 and interest drawn by him and crediting him with the $2,200 and interest paid by him. From an order denying plaintiff's motion for a new trial as to defendant McCullough, he appealed. From an order denying defendant Gjerde's motion for a new trial, he appealed. Affirmed on both appeals.

Gjertsen & Lund and *Henry J. Gjertsen,* for appellant Jacobson.

Arctander, Johnson & Berg, for appellant Gjerde.

Wright & Machan, for respondents McCullough and Cheney.

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SIMPSON, J.

June 21, 1909, Jacobson, plaintiff, and McCullough, one of the defendants, together agreed, in writing, with Foley, Welch & Stewart to do the grading for twenty-five miles of railroad near McGregor. This contract was thereafter performed on the part of Jacobson and McCullough at a large profit. Prior to the taking of this contract there had been talk among Jacobson and McCullough and the two other defendants, Gjerde and Cheney, of organizing a corporation to take over the business and outfit of Jacobson, who had for some time been in railroad construction work, and to carry on a general contracting business in such work. No definite plan to so incorporate was then matured, and because of apparent obstacles to McCullough joining such enterprise negotiations therefor were for a long period prior to June 21 wholly abandoned. At the time the contract was taken for the McGregor work, it was in the minds of both Jacobson and McCullough that the plan to incorporate to take over the Jacobson contracting business would be revived, and it was contemplated by them that the McGregor contract would be turned over to the corporation when such corporation was formed. There was, however, at this time, no understanding between Jacobson and McCullough, on the one hand, and Cheney and Gjerde, or either of them, on the other hand, that Jacobson and McCullough represented or had any authority to act for or in behalf of Cheney and Gjerde, or either of them, in taking the McGregor contract.

After the making of the McGregor contract, negotiations for the organization of a corporation in which the four-named parties would be stockholders were renewed, and it was agreed among these four that a corporation would be organized to take over the contracting business of Jacobson, and that the McGregor contract would be turned into the corporation, and that they would each become shareholders in the corporation. Pursuant to this general plan, the parties contributed to the contemplated corporation fund, "on account" or "in part payment" of interest in the proposed corporation, respectively, Gjerde, $2,000, Cheney $1,000, and McCullough $2,200. The money so contributed was handed to Jacobson, he issuing a

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receipt therefor. It was understood that the corporation would take over Jacobson's grading outfit at its value, to be later agreed upon. The funds so coming into the possession of Jacobson were used in the prosecution of the McGregor work. During the greater part of the period that the work under the McGregor contract was in progress, McCullough devoted his entire time to the work, receiving no salary. Jacobson assisted in the general direction of the work and in obtaining supplies and equipment therefor, but devoted a large part of his time to the superintending of another grading contract which he then had. Gjerde, who had for many years been a superintendent for Jacobson, served in that capacity on the McGregor work, drawing a salary of $150 per month. Cheney was otherwise employed, and performed no services in the carrying on of the McGregor contract.

The general understanding among these four men that a corporation would be formed, in which they would be shareholders, continued until February, 1910, but at no time were all the essential terms of incorporation agreed upon. Neither the total capitalization of the corporation, nor the respective share of each of the said promoters in the corporation, was at any time settled. On February 20, 1910, when the parties met to perfect plans for incorporation, they were wholly unable to agree as to the respective share of each in the proposed company, and all plans for incorporation were abandoned. A dispute then arose as to the interests of each of the parties in the property used in carrying on, and the proceeds arising out of, the McGregor contract. Thereupon Jacobson brought this action, making the other three parties defendant, and the issues raised involve the rights of the respective parties growing out of the above transactions.

Upon the trial, the court made findings, including substantially the facts stated above, and the additional facts: That plaintiff Jacobson and defendant McCullough were and are equal partners in the enterprise referred to as the McGregor contract, and that the defendants Gjerde and Cheney are not, nor is either of them, a partner in said enterprise. The court therefrom determined that Cheney and Gjerde were entitled to a return of the money contributed by

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them, with interest, and that McCullough and Jacobson were each entitled to a half interest in the profits of the McGregor contract, the exact amount each was entitled to receive to be determined by an accounting. The plaintiff and the defendant Gjerde separately moved for a new trial, and are now appealing from the order made denying each of said motions. The respective assignments of error involve the correctness of the findings of fact as to the relationship of the parties to the McGregor contract, and the conclusions of law based thereon.

The questions raised may be best disposed of by first determining what interest, if any, the promoters of the proposed corporation, as such, acquired in the McGregor contract. Both appellants claim that the McGregor contract was taken for the benefit and to be the property of a proposed corporation being promoted by Jacobson, McCullough, Gjerde, and Cheney, and that, the organization of the corporation having been abandoned, the proceeds of that contract should be distributed among the promoters of the corporation in proportion to their respective contribution to the funds of the proposed corporation. Appellants rely on the rule that where several persons associate themselves together, under a definite agreement to form a corporation for the carrying on of a certain business, and in furtherance of this plan do carry on the business for a time but fail to legally incorporate, in such case—whether the members be considered merely as promoters of a corporate enterprise, or as members of a quasi partnership—each member has an interest in the association property, and the extent of this interest is to be determined, not by the rule of implied equality of interest applicable to partners, but by regard to the proportionate amount of stock agreed upon as the share of each in the projected corporation. Cannon v. Brush, 96 Md. 446, 54 Atl. 121, 94 Am. St. 584; Shorb v. Beaudry, 56 Cal. 446; Crow v. Green, 111 Pa. St. 637, 5 Atl. 23.

This rule, carrying out as it does as nearly as possible the understanding and agreement of the parties, is, where applicable, just, and is in principle recognized by this court in the case of Tuller v. Swift, supra, page 263, 129 N. W. 572. It assumes, however, an

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enterprise undertaken and carried on for a proposed corporation, and is necessarily based upon the existence of an agreement between the parties promoting such corporation as to their respective interests therein. The facts wholly fail to bring the present case within the rule.

The corporation here proposed was not to be organized to obtain or carry on the McGregor contract, but to carry on a general contracting business in which the McGregor contract, already obtained, was to be only one incident. Plaintiff's contract for the Northtown work was to be taken over by the corporation and other work obtained. While the money paid in by Gjerde and Cheney was used in the McGregor work, it was put into a fund intended to be a permanent corporate fund, to be used for the general purposes of the corporation. At the time McCullough and Jacobson signed the McGregor contract there was between them, on the one hand, and Cheney and Gjerde, or either of them, on the other hand, no understanding or agreement that McCullough and Jacobson were acting for or representing in any way Cheney and Gjerde in signing the contract. The relationship of Cheney and Gjerde to the McGregor contract, if any, was established subsequent to the making of the contract and the acquiring by Jacobson and McCullough of rights therein. And finally the trial judge found, and the evidence amply sustains the finding, that the four parties herein never did arrive at an agreement, either as to the total capitalization of the proposed corporation or as to their proportionate shares therein. Entire disagreement on this point prevented the incorporation.

Under some circumstances an inference may be drawn from the payments made into the common fund as to the agreed proportionate interest of each in the common enterprise, but here the proof is that no agreement was arrived at. The payments made into the common fund were made "on account" of an interest in the corporation. To infer from these payments an agreement that the interest of each promoter in the corporation was to be in proportion to such payments would be directly at variance with the established facts in the case. The parties having refused to arrive at such an agreement, the court cannot make it for them.

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The controlling principle of the rule invoked by appellants, and established in the cases cited, is wholly lacking in this case. The parties never carried forward their agreement for incorporation to a point where any ascertainable interest was acquired by each of them as promoters of the corporation in the McGregor contract. There being not only no agreement as to the interest of each in the proposed corporation, but a disagreement, the respective payments of each into the proposed corporate fund do not furnish a proper basis for dividing the proceeds of the McGregor contract, nor would such division, if possible, be just as between the parties under the facts in this case. The contract, as it now appears, was of great value as soon as it was signed. The profits derived from this contract do not seem to have depended upon, nor to bear any proportionate relationship to, the money paid in by Cheney and Gjerde. The trial judge rightly concluded that Cheney and Gjerde were not entitled to participate in the proceeds of the McGregor contract, and that they, having paid money into a fund, the purpose of which had failed, were entitled to recover back the money paid in, together with interest for the use of it. Ashpitel v. Sercombe, 5 Exch. 147; Hudson v. West, 189 Pa. St. 491, 42 Atl. 190; London Assur. Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. ed. 688.

This conclusion makes clear the respective rights and interests of Jacobson and McCullough in the McGregor contract. The contract in its inception was their joint act. While they intended to turn the contract over to a corporation, when organized, and used the intended corporate name, together with their individual names, in signing the contract to facilitate such purpose, such transfer never became possible, because the corporation never came into being, and the individual promoters never agreed on the interest they would take in that or any other property intended for the proposed corporation. Jacobson and McCullough, as promoters of the proposed corporation, neither acquired nor parted with any rights in the McGregor contract. Their respective interests in the contract remained the interests which they acquired by their joint act in taking the contract and carrying forward the work to completion. It is unimportant that they never agreed to form a partnership by name. They

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intentionally did acts out of which rights and obligations arise that are identical with the rights and obligations of partners in a completed partnership enterprise. Bestor v. Barker, 106 Ala. 240, 17 South. 389. In McDonald v. Campbell, 96 Minn. 87, 89, 104 N. W. 760, it is said: "Where a partnership is the legal result of the agreement actually made, parties are partners, even though they have stipulated that they are not to be partners." The contract was entered into and performed on their part without any agreement between them that their interests should be other than equal. Under these circumstances, the proceeds of their joint enterprise will be divided equally between them.

The finding and conclusion in the trial court that Jacobson and McCullough were and are equal partners in the enterprise referred to as the McGregor contract, and that they are each entitled to one-half of the net proceeds of that contract, to be determined by an accounting as directed, are in accord with the facts and the law applicable thereto.

Affirmed on both appeals.

JAGGARD, J., took no part.

ELIZABETH GRUBER v. GERMAN ROMAN CATHOLIC AID SOCIETY OF MINNESOTA.[1]

January 27, 1911.

Nos. 16,929—(211).

Application for life insurance — answers.

A general question, in an application for life insurance, calling for information concerning "former illnesses" of the applicant, does not require the disclosure of an illness or ailment of a trifling, temporary, or unimportant nature, but only those of a serious, dangerous, or permanent character.

[1]Reported in 129 N. W. 581.

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Question for jury.

The question whether the application in this case failed to disclose a prior serious or permanent illness was one of fact for the jury, and the evidence sustains the verdict.

Charge to jury.

The assignments challenging the instructions of the court present no reversible error.

Action in the district court for Stearns county to recover $1,000 upon a policy of life insurance. The answer set up that certain answers of decedent to the application for insurance were knowingly and wilfully false, that the questions and answers were material to the risk and were relied upon by the defendant, and alleged that at the time of the application and of his admission to the society he was unsound in health and afflicted with the incipient stages of tuberculosis of the larynx. The reply denied these allegations of the answer and alleged that decedent was received as a member of defendant society upon the recommendation of the president and secretary of the local society to which he belonged and upon the medical examination and certificate of the examining physician of defendant society, and its acting agent. The facts are stated in the opinion. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $1,040. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

O. E. Holman, for appellant.

Theo. Bruener, for respondent.

Brown, J.

Defendant is a mutual aid association organized under the laws of the state. Rudolph Kracker was in his lifetime a member of the society, and the holder of a certificate of insurance therein for $1,000, payable on his death to his mother, plaintiff herein. The certificate was issued to him on January 29, 1907. He died May 26, 1909, and, after proper proofs of death had been made, plaintiff, beneficiary named in the certificate, defendant having refused payment, brought this action to recover thereon. Plaintiff had a

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verdict, and defendant appealed from an order denying its motion for judgment notwithstanding the verdict or a new trial. The questions presented are: (1) Whether the court erred in refusing to direct a verdict for defendant; and (2) whether there was reversible error in its instructions to the jury.

1. Defendant was formed along the lines of all societies of the kind. Members are admitted upon application, and losses from death are paid from assessments made in accordance with established rules and regulations. The application required of those seeking admission contains numerous questions designed to elicit information concerning the health and physical condition of the applicant, as a guide to the society in determining whether to admit them. It also contains the usual stipulation to the effect that, if any of the questions be untruthfully answered by the applicant, all obligations of the society cease, and the certificate of membership issued thereon becomes null and void. The application involved in the case at bar, as presented to and acted upon by the society in admitting decedent to membership, contained, among others, the following question and answer, namely:

Question—"Former illnesses and injuries?" Answer—"Small-pox in 1904. Complete recovery."

It is the contention of defendant that this answer, though apparently complete, was in fact incomplete and untrue; that prior to the application for membership decedent had suffered from tubercular laryngitis, a serious illness, and had received numerous treatments therefor, and in fact had been advised by his physician that a change of climate was essential to his recovery; and it is insisted that, because this illness was not disclosed, the answer was untruthful, and the defendant relieved from all obligations under the contract.

There can be no controversy but that the question was material, and a truthful answer necessary to give validity to the insurance contract. It was important for the society, in determining the question of the admission of decedent, to know the truth respecting his previous physical condition. Mattson v. Modern Samaritans, 91 Minn. 434, 437, 98 N. W. 330; Taylor v. Grand Lodge A. O. U. W., 96

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Minn. 441, 450, 105 N. W. 408, 3 L.R.A.(N.S.) 114. And if the answer was in fact not true, and decedent thereby concealed information which the society was entitled to, his good faith in making the same would perhaps not change the situation as a matter of law. Perine v. Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367. But the rule is settled, in this state and elsewhere, that general questions of the character of the one here involved do not require the disclosure of prior ailments of a trifling, temporary, or unimportant nature. Rupert v. Supreme Court U. O. F., 94 Minn. 293, 102 N. W. 715; Modern Woodmen v. Wilson, 76 Neb. 344, 107 N. W. 568. The rule no doubt is otherwise where the questions are specific.

There is no question in the case at bar that decedent was treated by a physician for some sort of an illness in 1905 and 1906, in reference to which the trial court, recognizing the rule just stated, instructed the jury that if the illness was of a serious, dangerous, or permanent character, or of a nature continuous and not readily recovered from, it was decedent's duty to make it known, and if he failed to do so no recovery could be had; but if the illness was merely temporary in its character, something that was unattended with any serious consequences, or from which serious consequences were not to be apprehended, something that passed away, from which he recovered and was forgotten, the failure to disclose it would not avoid the contract. The instructions correctly stated the law controlling the case, and we have only to consider the question whether the evidence justified the submission of the case to the jury.

The evidence tends to show that during parts of the years 1905, 1906 decedent was treated by his family physician for a throat trouble, the nature and character of which do not seem to have been disclosed to decedent. He was advised to make a change of climate, in the expectation that the difficulty would disappear. Acting on this advice, decedent, in the spring of 1906, moved to Colorado, and remained there until August of that year, when he returned to his home in this state. He was a young man of about twenty-four years of age, and resided with his parents upon a farm, where he was raised. After his return from Colorado, he reported to his physi-

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cian, who, noting his improved condition, pronounced him cured of the ailment for which he had treated him, and advised a return to the farm. Decedent had gained in flesh while away, and there was no return of the throat trouble until long after he became a member of defendant's society. He made his application for membership in January, 1907, and was then examined by defendant's medical examiner, who pronounced him strong, healthy, and vigorous, disclosing no evidence of disease or infirmity. In the fall of 1908, nearly two years from the date of his membership, he was again taken ill, and died of tubercular laryngitis in the spring of 1909.

It is the contention of defendant that the evidence is practically conclusive that decedent was suffering from this disease during the time of his treatment in 1905 and 1906, that his failure to disclose the same is fatal to plaintiff's right to recover, and that the court below should have so charged the jury.

Though the question is a close one on the evidence, we conclude that it was properly submitted to the jury. Decedent's physician did not attempt in his testimony to name the illness which he treated in 1905. He said, on being questioned upon the subject, that he "surmised" it to be laryngitis, but doubted the correctness of his diagnosis when decedent returned from Colorado fully recovered and in good health and condition. Controlling effect is not to be given the advice of the physician. Suggestions that a change of climate would be beneficial are often made by physicians, when no serious ailment or disease is present. There is no evidence that he informed decedent of his impressions, and it is clear from the record that decedent had no thought that he was suffering from a serious ailment. He fully believed that his throat trouble had disappeared, and there can be no question that his failure to disclose the matter in answer to the question referred to was not for the purpose of concealment. It was apparently a forgotten matter with him. The physician also testified that the disease finally resulting in death might well have originated and come on after decedent had become a member of the society.

On the other hand, a physician called by defendant testified that

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in his opinion, based upon the history of the case, decedent was afflicted with the particular disease from 1905 to the time of his death. Defendant offered other evidence tending to show the appearance of decedent during the years of 1907 and 1908, which tended to indicate some permanent infirmity or illness, conflicting with which was evidence offered by plaintiff that after decedent returned from Colorado, and up to the time he was taken with his fatal illness, his appearance indicated good health and a robust condition.

In this condition of the evidence we are not justified in declaring as a matter of law that decedent's illness in 1905 was that of which he subsequently died, or that it was of a serious character, within the rule controlling the question.

2. A consideration of the charge of the court, taken as a whole, fairly presented the law of the case to the jury, and we discover therein no reversible error. We do not concur in the contention of the defendant that the effect of the charge upon the minds of the jury was to require proof on the part of defendant that the illness "was of a serious, dangerous, *and* permanent character." The charge was evidently given with some care and in substantially this language: "If this sickness, or illness, or trouble, whatever it was, that he had in 1905, was serious, or dangerous, or permanent, or something that the effects of it were continuous, something that was not readily recovered from, it was his duty to disclose it." This clearly could not have impressed the jury with the theory that the illness, to require its disclosure, should be shown to have been something of a permanent *and* fatal character. If counsel thought the jury likely to misunderstand the terms, "serious," "dangerous," "permanent," or the phrase "not readily recovered from," further instructions should have been requested. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

Order affirmed.

JAGGARD, J., took no part.

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EDWARD A. BENSON v. UNITED STATES INSTALMENT REALTY COMPANY.[1]

February 3, 1911.

Nos. 16,765—(90).

Joinder of causes of action.

Complaint construed, and *held*, that two causes of action are properly united therein; for both are in form ex contractu for money had and received. It is immaterial in such cases that the money was obtained by fraud.

Action in the municipal court of Minneapolis to recover $341.25 for money had and received. The facts are stated in the opinion. From an order, Waite, J., overruling defendant's demurrer to the amended complaint, it appealed. Affirmed.

John A. Larimore, for appellant.

Dougherty & Edwards, for respondent.

START, C. J.

Appeal from an order of the municipal court of the city of Minneapolis overruling the defendant's demurrer to the amended complaint on the ground that two distinct causes of action are improperly united therein. The defendant urges in support of its demurrer that the first alleged cause of action is either one for deceit or for equitable rescission on the ground of fraud, and the second one is upon contract.

The second one is concededly one on contract. As to it the complaint alleges that between March, 1904, and July, 1906, the defendant had and received money aggregating $341.25, which belonged to the plaintiff, and which it then promised to pay him, but no part thereof has been paid. This is substantially a count for money had and received, which can be maintained whenever one party has received or obtained possession of the money of another

[1]Reported in 129 N. W. 594.

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which in equity he ought to pay over. It is immaterial in such a case that he obtained it by fraud. Lund v. Davies, 47 Minn. 290, 50 N. W. 79.

The allegations of the complaint as to the first cause of action, so far as here material, are to the effect that, on March 26, 1904, the defendant represented to the plaintiff that, if he would sign an application for a policy in defendant company, it would issue a policy to him, and if he would pay to it $15 cash and $11.25 each month, until $3,600 was paid, it would further, within eighteen months and not to exceed twenty-four months from such date, loan him $3,000, and the $3,600, when so paid, would be in full payment, including interest; that if the loan was not made within twenty-four months from such date the defendant would repay to him all money paid by him to it, with interest; that the plaintiff relied upon the representations, and, induced thereby, then agreed to sign an application for the policy and to make such payments, to which the defendant agreed; that thereupon the defendant presented a paper to him to sign, and stated to him that it contained the terms of the agreement, and nothing more, and, relying upon such statement, he signed the application without reading it, and in like manner a policy was delivered to and received by him, in the belief that all such papers were in accordance with the representations made; that afterwards in like manner the plaintiff was induced to accept a new policy in exchange for the original, which the defendant represented the same as the original was represented to be, except the monthly payment was to be $12; that the plaintiff made the monthly payments for twenty-four months, which aggregated $341.25, without any notice or knowledge that the policy and papers were not in accordance with the original representations; that after making the last payment he learned for the first time that the representations were false and fraudulent, and that the policies he was so induced to accept did not embody the agreement of the parties, and were in fact a fraud upon him, stating the facts; and, further, that upon learning such facts he repudiated the policy and returned it to the defendant, and demanded the repayment of the money so paid to the defendant.

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The complaint demands judgment only for $341.25, and it is quite apparent that the complaint states only one cause of action, but in two separate counts. But, this aside, it is quite clear that there is no misjoinder of actions on the face of the complaint. The defendant claims that the complaint does not allege that the contract was made as represented. It alleges that the representations as to the terms of the contract were made, that the plaintiff relied upon them, and that the defendant agreed to such terms. Again it is distinctly alleged that the plaintiff parted with his money in reliance upon the representations of the defendant that the terms of the policy were the same as those represented and agreed upon. Such being the case, the plaintiff had the right, if he so elected, upon the discovery of the falsity of the representations, to rescind, return the policy, and demand the money so paid. In its last analysis the first cause of action alleged is in form ex contractu for money had and received, in which the means used by the defendant to secure the plaintiff's money is alleged.

Order affirmed.

JAGGARD, J., took no part.

WILLIAM McMULLEN v. A. P. HEANEY and Others.[1]

February 3, 1911.

Nos. 16,788—(57).

Cancellation of contract — evidence — fraud.

Evidence and record considered, in this an action to cancel a contract on the ground that the plaintiff was induced to make it by fraudulent representations, and *held*, that there is sufficient evidence to sustain the finding of the trial judge that no misrepresentation was made, and that there was no error in excluding certain evidence offered.

[1] Reported in 129 N. W. 764.

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Action in the district court for Hennepin county to have a certain note declared cancelled and void; in case the note could not be delivered up and cancelled that plaintiff recover $1,375; that in the event it be delivered plaintiff have judgment for $625; and that the contract between plaintiff and defendants Murphy and Gleason with defendants Heaney be cancelled. The facts are stated in the opinion. The case was tried before Booth, J., who made findings of fact and as conclusion of law ordered judgment in favor of defendants Heaney and Miller. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

M. C. Brady, for appellant.

J. M. Freeman, and *Lind, Ueland & Jerome,* for respondents.

SIMPSON, J.

The appellant, with others, bought from Heaney & Co., on terms set out in a written contract, the right to sell the Harrison wagon scale in a part of the state of Wisconsin for the term of two years, and appellant, at the time of the purchase, as his proportionate part of the purchase price, paid Heaney & Co. $625 and gave his note for $750. Thereafter appellant brought this action to obtain the cancellation of the contract of purchase, and the return of his note, and repayment of the money paid by him on the purchase price, alleging as ground for such relief that he was induced to make said purchase by the fraudulent representations of the vendors. The case was tried by the court without a jury, and a decision rendered adverse to the plaintiff, the appellant here. From an order denying a new trial, he appeals to this court.

The various errors assigned question: (1) The finding of the trial court that no fraudulent representations concerning the scale were made at the time of the purchase; (2) certain rulings excluding testimony offered by the plaintiff upon the trial.

1. An examination of the record discloses that testimony was submitted tending to establish the making of false representations by the vendors to the plaintiff; but there was a conflict in the evidence bearing upon this question. The issue raised thereby was determined by the trial judge adversely to the plaintiff. That finding is

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sustained by the evidence in the case. Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108.

2. Upon the trial, the plaintiff relied, in part, to sustain his claim of fraud, upon a claimed misrepresentation made to him that the scale could be attached to any farm wagon. The plaintiff, in accordance with this claim, proceeded to prove the representation made, that it was false, and that the plaintiff relied on it. Upon the plaintiff's testimony as to the representation made, the trial judge determined, as shown by his statements and rulings during the trial, together with his findings of fact and memorandum filed, that the representation in fact made was entirely different from the representation which plaintiff claimed was made. This determination rendered immaterial evidence tending to show that the claimed representation was false, and that the plaintiff believed it, and there was no error in the rulings complained of excluding such evidence.

There appearing to be no prejudicial error in the record, and there being evidence to sustain the findings and conclusion of the trial court, the order appealed from is affirmed.

JAGGARD, J., being absent, took no part.

ALONZO J. KITMAN v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

February 3, 1911.

Nos. 16,856—(213).

Correctness of railway records question for jury — movement of trains.

In a personal injury action, wherein it was claimed that the tender to appellant's engine was defective, and the question in dispute was whether the engine left the roundhouse at a certain time, *held*, appellant's records, purporting to show the time all engines left the roundhouse to go upon the road, a record claimed to show the time when repairs were made upon

[1]Reported in 129 N. W. 844.

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engines, and a train dispatcher's record, purporting to show the movement of all trains, were not conclusive evidence that the engine left the roundhouse at the time claimed by appellant. The validity and correctness of the records were for the determination of the jury, and were properly submitted to the jury, to be considered in connection with all the evidence pertinent to the issue.

Admission of employment — evidence inadmissible.

This action was commenced against the Chicago, Burlington & Quincy Railroad Company, and the complaint alleged that the plaintiff was in the employ of that company. The answer admitted the employment by that company, and by special defense alleged that plaintiff was in the employ of the Chicago, Burlington & Quincy Railway Company, and had released that company from further liability by accepting benefits from the relief department thereof. *Held*, the admission that the plaintiff was in the employ of the railroad company was controlling, and that evidence offered in support of the special defense was properly rejected.

Excessive damages.

It does not appear that the verdict was excessive.

Action in the district court for Ramsey county to recover $30,000 for personal injuries sustained while employed by defendant as a locomotive fireman. The complaint alleged that the engine was unsafe in that one of the stay-chains or safety-chains coupling the locomotive and the tender was lost, and in that the safety-hangers upon the brake beams of the tender had been lost. The answer denied that the injury was caused by defendant's negligence, admitted that plaintiff was in defendant's employ, as stated in the opinion, and for a special defense alleged that long prior to February, 1906, the time of the accident, the Chicago, Burlington & Quincy Railway Company organized an association consisting of itself and such of its employees as should join the same and contribute thereto, for the purpose of maintaining a relief fund to be used in the payment of those employees contributing thereto who should be entitled thereto; that by the regulations in case any deficiency should arise, in case other receipts to the fund were insufficient to pay the benefits due the members, the deficiency should be made up by the railroad and railway companies, and in case a member should bring suit against defendant for damages on account of injuries to such member, pay-

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ments for benefits from the funds should cease until the action was discontinued, or if it should be compromised or proceed to judgment, all claims upon the relief fund should be thereby precluded; that plaintiff became a member in December, 1903, and remained an employee of the railway company until July 1, 1907, when he became an employee of defendant, and he was a member of the relief fund when the accident happened and until July, 1908, and after the accident received and accepted certain sums from the relief fund in full release and discharge of said claims. On July 1, 1907, the defendant railroad company succeeded the Chicago, Burlington & Quincy Railway Company "in the operation and enjoyment of the franchise." The other facts are stated in the opinion.

The case was tried before Hallam, J., and a jury which returned a verdict in favor of plaintiff for $11,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Morton Barrows, for appellant.

Barton & Kay, for respondent.

Lewis, J.

Plaintiff was employed as fireman on engine No. 1917 at La Crosse, Wisconsin, and he claims that the engine, pulling a string of freight cars, left Grand Crossing, near La Crosse, on the evening of February 19, for St. Paul, and that the tender became derailed near Prescott, resulting in injury to him. Negligence was charged in failing to provide the tender and engine with proper safety chain connections and proper brakebeam supports. Plaintiff recovered a verdict of $11,000, and the appeal presents three questions for review:

1. Was there any trustworthy evidence to establish negligence? Two witnesses testified for plaintiff that they were employed to do some repairing on the engine at Grand Crossing about eight o'clock on the evening of February 19, that the proper chains were missing at that time, and that the engine was moved out before being repaired. To meet this testimony, defendant introduced in evidence a record purporting to contain a correct statement of the time every

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engine was fired up and left the roundhouse. This record, under date of February 19, 1906, contained the entry: "Engine 1917 ordered for 5 p. m. extra north, left the roundhouse at 4:10 p. m. Crew, W. H. Davis and Kitman." Another record was introduced in evidence to prove that no repairs were made on engine 1917 on February 19, 1906.

A paper purporting to be the train dispatcher's record was also introduced in evidence by defendant, which showed that the train to which engine 1917 was attached left Grand Crossing at 5:20 p. m. February 19, 1906. This record also showed where the train was at various points on its passage north. The engineer testified that the train left La Crosse at five o'clock in the afternoon. There was some testimony tending to corroborate plaintiff's claim that the engine did not leave the roundhouse until later than the records show. Attention is also called to some apparent omissions in the train order record, apparently bearing on its accuracy. We are asked to hold that these railroad records must be received with absolute verity as establishing the fact that the engine left Grand Crossing prior to the time it was claimed to have been examined by plaintiff's witnesses. The trial court was of the opinion that the accuracy of the records and the veracity of the witnesses were for the jury, and submitted the question with proper instructions. While records of this character are entitled to careful consideration, and cannot be lightly brushed aside, we cannot say in this instance that they must be accepted as final on the disputed point.

2. This action was commenced against the Chicago, Burlington & Quincy Railroad Company, and the complaint alleged that plaintiff, at the time of injury, was in the employ of that company, which was duly organized under the laws of Illinois, and was engaged in operating a railroad. The answer admitted that plaintiff was in defendant's employ on the nineteenth day of February, 1906, denied liability, and alleged as a separate defense that long prior to that date the Chicago, Burlington & Quincy Railway Company had organized a benefit relief association, known as the Relief Department of the Chicago, Burlington & Quincy Railway; that plaintiff had become a member of the association in 1903, and continued to be a

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member until long after the accident, had accepted benefits therefrom, and had released all claims against the railway company. The court ruled out evidence offered to substantiate this defense, on the ground that it furnished no proof of release against the defendant, the railroad company.

We agree with the trial court that the admission in the answer that plaintiff was employed by the railroad company at the time of the accident is not controlled by the special defense that he was employed by and released the railway company from all liability. The admission was definite, and plaintiff was justified in relying on it at the trial without proof. If defendant intended to prove that plaintiff was in fact employed by the railway company, that issue should have been squarely raised by a denial, and not by an admission. While the evidence offered and rejected may have tended to prove that plaintiff had received benefits from another corporation, it did not necessarily prove that plaintiff had released the defendant railroad company. It does not appear from the pleadings that the two companies are identical, and, if they were, the admission controls. No motion was made to amend the answer, and appellant is in no position at this time to complain of the construction put on the pleadings by the trial court.

3. Was the verdict so large as to indicate passion and prejudice? The medical testimony was conflicting, as in most cases of this character. The injuries claimed were supported principally by what are known as subjective symptoms; but that the plaintiff was seriously and permanently injured can hardly be disputed on the evidence. The charge that the jury were actuated by passion and prejudice is not sustained, and the facts in Johnson v. Great Northern Ry. Co., 107 Minn. 285, 119 N. W. 1061 were quite different. Our views of this question cannot be better expressed than in the words of the trial court: "These cases where the immediate injury is comparatively small, but which involve nervous disorders, are among the most difficult of any with which the court has to deal. In Johnson v. Great Northern Ry. Co., 107 Minn. 285, the court makes clear the necessity of the utmost circumspection in such cases. On the other hand, the opinion in the case of Galloway v. Chicago, M. &

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St. P. Ry. Co., 56 Minn. 346 [57 N. W. 1058, 23 L.R.A. 442, 45 Am. St. 468], makes it clear that such cases may justify the allowance of very substantial damages. There were many objective facts testified to in this case, and not disputed, from which the jury might fairly find that plaintiff has been and is suffering from a serious ailment. The opinions of his three attending physicians, based largely on those objective facts, as well as the subjective symptoms, are that his injury is permanent, and that he will be permanently incapacitated for any serious work. If these facts are true and these opinions are correct, the damages are not too large. The jury has evidently so found, and I cannot disturb their verdict. See Southern Pac. Co. v. Rauh, 49 Fed. 696 [1 C. C. A. 416]; McCord v. Minneapolis, St. P. & S. S. M. Ry. Co., 96 Minn. 517 [105 N. W. 190]; Masteller v. Great Northern Ry. Co., 103 Minn. 244 [114 N. W. 757]."

Affirmed.

JAGGARD, J., took no part.

CORA KELLY v. ANCIENT ORDER OF HIBERNIANS LIFE INSURANCE FUND OF MINNESOTA.[1]

February 3, 1911.

Nos. 16,867—(230).

Mutual benefit association — proof of death — limitation of action.

The constitution and by-laws of respondent, a mutual benefit association, provides that the division secretary shall forthwith notify the secretary when a member is removed by death, and that the secretary shall forward to the division secretary blanks for making proofs of death; the amount of the policy being payable sixty days after the proofs are furnished, and there

[1] Reported in 129 N. W. 846.

[Note] Time of death of one presumed to be dead after seven years' absence, unheard of, see note in 26 L.R.A.(N.S.) 294.

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being no express provision that the beneficiary shall give notice of death or make proof thereof. John Kelly was a member in good standing, and disappeared from his home while suffering from a fatal disease, leaving his wife, the beneficiary, and four young children in destitute circumstances. The dues were paid and the policy kept in force for the period of six years after his disappearance. All of these facts were known to the division secretary.

In an action to recover the amount of the policy, commenced more than seven years after it lapsed for nonpayment of dues, *held:*

1. The policy did not become void for nonpayment of dues, since the evidence was sufficient to warrant the jury in finding that the member came to his death prior to the time payment was stopped.

2. It is to be implied from the contract that it is the duty of the beneficiary to notify the division secretary of the death of the member; but, when the facts are known to that officer without such notice, it is his duty to proceed at once and make up the proofs of death.

3. For the purpose of securing blanks and making and submitting proofs of death, the division secretary is the agent and representative of the association; and his failure to perform that duty will not release the association from its obligation to make payment of the claim, if the member died while the policy was in force.

4. While the beneficiary might have commenced an action on the policy within a reasonable time after making demand on the local secretary, her cause of action was not barred by the statute of limitations because of her failure to make demand, to furnish proofs of death, or to commence the action within six years from the time it might have been commenced.

5. The association cannot be heard to take advantage of its own negligence in failing to make up the proofs of death, or, if it repudiated the claim, in failing to notify her to that effect.

Action by the administratrix of the estate of John Kelly, deceased, in the district court for Hennepin county to recover $1,000 upon his life insurance policy. The substance of the answer is stated in the opinion, where the facts are stated. The case was tried before Simpson, J., who granted defendant's motion to dismiss the action on the ground it was barred by the statute of limitations. From an order denying plaintiff's motion for a new trial, she appealed. Reversed.

John J. McHale, for appellant.

O. H. O'Neill, for respondent.

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LEWIS, J.

John Kelly became a member of respondent association in 1886, and a certificate of insurance of $1,000, payable to his wife, Annie Kelly, was issued. Mr. Kelly disappeared from his home in Minneapolis August 1, 1894, leaving his wife and four children. The dues upon the certificate were paid by friends until December, 1900. This action was commenced January 12, 1909, to recover the amount of the certificate. The answer alleged that Kelly was suspended as a member for failure to pay his dues after December 31, 1900, and that his membership terminated January 1, 1901; that on August 1, 1908, Mrs. Kelly demanded that the division secretary notify the secretary of the death of Mr. Kelly, and that she furnished the secretary with certain affidavits which she claimed to be proofs of death, and demanded payment of the amount due; that the division secretary refused to take any action, and turned the proofs of death over to the secretary, and decided that the claim was invalid; that Mrs. Kelly thereupon took an appeal, with the result that the claim was disallowed by the board of directors. For a separate defense, the answer pleaded that the cause of action did not accrue within six years before its commencement. The trial court directed a verdict in favor of defendant, upon the ground that the action was barred by the statute of limitations.

The constitution and by-laws of the association provide that the amount due, not exceeding the sum of $1,000, will be paid within sixty days after due and satisfactory proof of the assured's death while a member in good standing. Section 43 of the by-laws provides that, when a member is removed by death, the division secretary shall forthwith notify the secretary; and section 44 provides that upon receipt of such notice the secretary shall forward for execution to the division secretary forms known as "death proofs."

Mr. Kelly's departure, and the circumstances connected with it, were matters of common knowledge in the community and in the local lodge. Every item of importance within the knowledge of the beneficiary had been communicated to the division secretary. The condition of his health, the circumstances of his family, and the payment of the dues for six years by a friend, were known to him. He

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knew that the payment of dues was stopped because it was assumed that Mr. Kelly was dead. After Mr. Kelly's disappearance, the local lodge joined with the family in advertising for and in the endeavor to locate him. The constitution and by-laws made it his duty to make demand on the secretary for blank forms of proof of death; whereas the beneficiary was not required to furnish proofs, nor was there any express requirement that she make demand for proof of death.

The case of Behlmer v. Grand Lodge A. O. U. W., 109 Minn. 305, 123 N. W. 1071, 26 L.R.A.(N.S.) 305, throws very little light upon the question now before the court. In that case it was held that the beneficiary was entitled to permit the entire seven years to elapse in order to have the benefit of the presumption of death, and failure to pay the dues during that period did not prevent recovery, if it was proved that he died before the policy lapsed for nonpayment. The facts connected with Behlmer's disappearance were such as to warrant the jury in finding that he came to his death before the policy lapsed. So here the circumstances surrounding the disappearance of Mr. Kelly would have warranted the jury in finding that he had died before the policy lapsed. But in the Behlmer case the contract of insurance provided that the beneficiary furnish the proofs of death. Here there is no such provision; but, of course, the division secretary could not proceed until he knew it.

He is not required to ascertain when members die. His duty begins when he is informed of the fact of death. Consequently it is implied, though not expressed, that those immediately interested in the collection of the policy shall see that he is notified. But when the division secretary has knowledge of a death it would serve no useful purpose to give him additional notice. It is the fact of notice, and not the manner in which it is communicated, which makes it the duty of that officer to act. The division secretary is made the agent of the organization for the purpose of performing this particular thing. He is not possessed of the power, under the constitution and by-laws, to protect the organization from liability by failure to perform his duty, and the organization cannot take

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advantage of his omissions or neglect, when committed within the line of his duty.

On the first of August, 1901, if not before, the beneficiary might have made demand upon the secretary for proofs of death, and for payment, and upon refusal this action could have been commenced. She did nothing for seven years, and nothing was done by the division secretary for the same length of time. Did the statute of limitations commence to run simply because the beneficiary did not call upon the division secretary to perform a duty which he was required to perform without any demand being made? The learned trial court was of the opinion that the organization was entitled to notice from some one, and that the contract of insurance contemplated that steps toward the recovery should be taken immediately upon death, and that, if the secretary did not perform his duty, then it became the duty of the beneficiary to see that he did so within a reasonable time, that no action was taken within a reasonable time, and that the action was barred by the statute.

Very few cases have been before the courts which involved constitutions and by-laws similar to those under consideration. Very generally it is expressly made the duty of the beneficiary to take the initiative and give notice of death and furnish proofs. In Anderson v. Supreme Council, 135 N. Y. 107, 31 N. E. 1092, no duty was imposed upon the beneficiary to furnish proofs of death, and it was held that all she was required to do was to notify the officers of her husband's death. But the question now before the court was not involved. In Murphy v. Independent Order, 77 Miss. 830, 27 South. 624, 50 L.R.A. 111, it was expressly held that the subordinate lodge was the agent of the grand lodge with respect to the proofs of death, and that the beneficiary, who was not in default, could not be deprived of his right to recover by a wilful failure of the officers of the subordinate lodge to perform their duty. In Supreme Tent v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049, where similar by-laws and constitution were under consideration, the court remarked (page 480): "It may well be inferred from the evidence that the local tent was as well informed of all the material facts concerning the death of the assured as was the appellee, and had such knowledge

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of the facts on which the jury decided that the assured was dead that it was incumbent upon the appellant's agent in the premises, the local tent, to give the notice to the supreme tent, and to procure from it the blank form of proofs of the death. The failure of the appellant to perform its duty under its by-laws in this respect could not deprive the beneficiary of her right to payment under the certificate."

The argument is persuasive that the time for commencing suit should not be indefinitely postponed; but it seems that the by-laws and constitution were drawn to favor payment when the policy is kept in good standing by the payment of the dues. True, Mrs. Kelly might have taken some course which would have started the statute running against her. She might have demanded that the proofs be taken. The officers might have notified her that the order did not consider the claim valid, and upon receiving notice to that effect she would have been required to act within a reasonable time in order to prevent the running of the statute. However, no such notice was served, and she had a right to assume that the officers would perform their duty, prove up the claim, and pay over the money. The association ought not to complain of this construction of the contract. The order was created for a benevolent purpose—to provide for those dependent upon its members. Construed from this point of view, the contract takes notice of the ignorance of those likely to be selected as beneficiaries. Instead of requiring them to be on the alert and to take the initiative, the burden is imposed on the local secretary, when he has knowledge of the decease of a member, to prove up the case and secure the money. The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment.

For these reasons the cause of action was not barred, and the case should have been submitted to the jury to determine the facts.

Reversed.

JAGGARD, J., being absent, and SIMPSON, J., took no part.

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N. P. EMIL CARLSON v. MINNESOTA LAND & COLONIZATION COMPANY and Others.[1]

February 3, 1911.

Nos. 16,874—(237).

Reservation in deed — intent of parties.

The proper rule for the construction of a deed of conveyance which contains an exception or reservation is to ascertain the intention of the parties by a consideration of the entire instrument, the purpose of introducing the exception or reservation, its nature, and the attending facts and circumstances surrounding the parties at the time of its execution.

Reservation of minerals — construction.

A deed conveying eighty acres of land contained the following reservation and exception:

"Reserving and excepting from said lands such as are now known, or shall hereafter be ascertained, to contain coal or iron, and also the use of such surface ground as may be necessary for mining operations, and the right of access to such reserved and excepted coal and iron lands, for the purpose of exploring, developing, and working the same, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, with the reservations and exceptions before stated."

Held, the exception is not repugnant to the grant and is not void for uncertainty. The instrument operates as a conveyance of the land with the exception of the coal and iron contained therein, reserving the right to enter upon the same for the purpose of exploring and mining the minerals excepted.

Action in the district court for Crow Wing county to determine adverse claims to certain vacant and unoccupied land. The substance of the answer is stated in the opinion. Plaintiff's demurrer to the separate answer of defendant company was overruled. From a judgment, Stanton, J., adjudging title to the land to be in defendant Minnesota Land & Colonization Company, plaintiff appealed. Affirmed.

B. H. Bowler, for appellant.

[1]Reported in 129 N. W. 768.

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Lightner & Young and *Parsons & Brown* and *E. T. Young,* for respondent.

LEWIS, J.

Action to determine adverse claims of title to eighty acres of land in Crow Wing county. The Minnesota Land & Colonization Company answered, and alleged that in 1905 it conveyed the premises to Ellzey by a deed which contained the reservation and exception as follows: "Reserving and excepting from said lands such as are now known, or shall hereafter be ascertained, to contain coal or iron, and also the use of such surface ground as may be necessary for mining operations, and the right of access to such reserved and excepted coal and iron lands, for the purpose of exploring, developing, and working the same, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, with the reservations and exceptions before stated." And the answer also alleged that the plaintiff bought the lands subject to the right, title, and interest therein, as provided by the reservation.

Plaintiff demurred to the answer, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was overruled, and the plaintiff appealed. The suggestion of appellant is that the reservation is void for uncertainty, and that the exception is repugnant to the grant, and void.

There are certain elementary principles with reference to the construction of reservations and exceptions in deeds, which require no special consideration. The intention of the parties is to be ascertained from the entire instrument, including the reservation or exception. This includes the ordinary meaning of the words, recitals, context, subject-matter, the object or purpose of introducing the exception or reservation clause, the nature of the reservation or exception, and the attending facts and circumstances surrounding the parties at the time of the making of the deed. It is also elementary that the reservation or exception is void, when totally repugnant to the granting clause. When the grant is direct and positive, it cannot be set aside by an indirect method in the form of an exception or reservation.

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Generally speaking, an exception is a part of the thing granted, and must be in esse at the time of the grant. A reservation is some new thing created by the terms of the grant, as an easement or right of way. They are often used interchangeably. The first clause, "reserving and excepting from said lands such as are now known, or shall hereafter be ascertained, to contain coal or iron," taken by itself, would seem to refer to the entire tract granted, surface and all, and would be repugnant to the grant. The second part, "reserving the use of such surface ground as may be necessary for mining operations, and the right of access to such reserved and excepted coal and iron lands for the purpose of exploring, developing, and working the same," when considered without reference to the first part, is incomplete. But we must consider them together, and see if the parties succeeded in expressing any definite purpose. This form of expression is not uncommon, when it is the intention to except the minerals from the grant. For instance, in Farrell v. Howard, 52 Minn. 76, 78, 53 N. W. 801, the following was recognized as a proper form of excepting the minerals: "Reserving and excepting from said described premises so much and such part thereof as are or may be mineral lands, or may contain gold, silver, copper, coal, or iron, and also the use and right and title to the use of such surface grounds as may be necessary for mining operations, and the right of access to such reserved and excepted mineral lands, including lands containing gold, silver, copper, coal, or iron, for the purpose of exploring, developing, and working the same."

While each part of the exception now before us, when considered separately, fails to express any definite, valid, exception or reservation, when considered as a whole it becomes intelligible. The owner may convey any part of real estate. He may convey some particular deposit or stratum and retain the surface, or he may convey a part or all of the mineral strata or deposits and retain the surface. Such strata or deposits are land. In this deed the use of the surface is expressly reserved for mining operations. If it was the purpose to convey title to the surface, there was no reason for reserving the use of the surface; hence title to the surface passed to the grantee. The subject of coal and iron was referred to for some purpose. It

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was the common practice in that part of the state to except the minerals in grants of real estate. From all these circumstances it fairly appears that the title to the land, including the surface, was intended to pass to the grantee, with the exception of the coal and iron ore contained therein.

We have, then, a grant of the land with the exception of the coal and iron, with the right, in the nature of a reservation, to enter upon the premises for the purpose of exploring and mining the minerals excepted. Farrell v. Howard, 52 Minn. 76, 53 N. W. 801; Sanborn v. City of Minneapolis, 35 Minn. 314, 29 N. W. 126; Knight v. Indiana, 47 Ind. 105, 17 Am. Rep. 692; Caldwell v. Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. Law Rep. 987, 13 L.R.A. 289; 13 Cyc. pp. 672–678.

Affirmed.

JAGGARD, J., absent, took no part.

L. M. COLEMAN v. MINNEAPOLIS STREET RAILWAY COMPANY and Others.[1]

February 3, 1911.

Nos. 16,875—(220).

Concurrent negligence.

In an action to recover damages for personal injuries, it is *held* that the evidence justified the jury in finding that the concurrent negligence of defendants, acting independently, was the proximate cause of plaintiff's injury.

Action in the district court for Hennepin county to recover $5,300 for personal injuries. The facts are stated in the opinion.

[1]Reported in 129 N. W. 762.

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The case was tried before Simpson, J., and a jury which returned a verdict against both defendants in the sum of $3,300. Defendants Hartig and Hellier moved for judgment notwithstanding the verdict, and their motion was denied; their motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to $2,500. From the judgment entered pursuant to the verdict as reduced, defendants Hartig and Hellier appealed. Affirmed.

P. J. McLaughlin, for appellants.

John F. Dahl, W. O. Stout, and *D. R. Frost,* for respondent railway company.

Albert E. Clarke and *D. F. Carmichiel,* for plaintiff.

Brown, J.

Plaintiff, an electrical engineer, was in the employ of defendants Hartig & Hellier, a copartnership. On September 4, 1908, he was engaged in wiring a building in the city of Minneapolis in performance of a contract entered into by his firm with the owner thereof. On the afternoon of that day, with Mr. Hellier, a member of the firm, he started from their workshop to the building being wired with an auto truck loaded with material to be used in the building. They were required to cross Fourth Avenue South, upon which defendant railway company operates its street cars. Hellier was guiding and controlling the movements of the auto truck, and plaintiff was seated with him in the front end thereof. As they crossed the car tracks on Fourth Avenue South, the truck was struck by a street car, and plaintiff, as a result thereof, received serious injuries to his person. He thereafter brought this action against the street railway company and his employers, charging the railway company with negligence in the operation of its car and his employers with negligence in operating the auto truck. Plaintiff had a verdict against both defendants, and defendants Hartig & Hellier moved the court in the alternative for judgment or a new trial, which was denied. The court, however, reduced the verdict from $3,300 to $2,500, which plaintiff consented to. Judgment was thereafter entered, and Hartig & Hellier appealed.

The assignments of error in this court present only one question, namely, whether the court below erred in denying appellants' mo-

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tion for judgment notwithstanding the verdict. The errors assigned below as a basis for the motion for a new trial are not urged on this appeal. We have only to determine, therefore, whether the evidence was sufficient to justify the jury in finding negligence on the part of appellants.

It is not questioned that appellants, having undertaken to convey plaintiff in an auto truck to his place of work, owed him on the occasion in question, in respect to the operation and control of the truck, the duty of exercising reasonable care for his protection from injury likely to follow a negligent or improper management of the same; nor can it be questioned that the street car company owed plaintiff the duty of exercising reasonable care to avoid injury to him. As to plaintiff both may be liable on the doctrine of concurrent negligence, though in a controversy between themselves one defendant might be exonerated because of the contributory negligence of the other. Plaintiff, in riding in the auto truck with a member of defendant firm, was not engaged in a joint enterprise, nor had he any control over the movements of the truck. A member of the firm was operating it, and his negligence cannot be attributed to plaintiff. So that if there was negligence in the management of the truck, and in operation and control of the street car, plaintiff may recover against both defendants, for no claim is made that he was guilty of any negligence contributing to the accident. If both were in a measure negligent, as to plaintiff they were joint wrongdoers. To entitle appellants to a reversal, therefore, it must appear that they were wholly free from fault. King v. Chicago, M. & St. P. Ry. Co., 77 Minn. 104, 79 N. W. 611; McClellan v. St. Paul, M. & M. Ry. Co., 58 Minn. 104, 59 N. W. 978; Johnson v. Northwestern Tel. Exch. Co., 48 Minn. 433, 51 N. W. 225; 29 Cyc. 487.

We shall not discuss the evidence. It is sufficient to say that we have examined the record and find therein evidence reasonably and fairly tending to sustain the jury in finding negligence on the part of defendants in the management of the truck by Hellier, a member of the firm, and, whether greater or less in degree than that of the street car company, sufficient to support the verdict for plaintiff.

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The driver of the truck was aware of the fact, on approaching the car track, that a street car might be approaching from one direction or another, and that unless he kept his truck under control a collision might occur, if the approaching street car was not also under control. The evidence tends to show that he observed the car in time to have avoided the collision, but instead of stopping the truck, or turning aside, as he could have done, he attempted to cross in front of the approaching car, and was struck just as the rear end of the truck was passing over the track. It is probable that if the motorman had been in control of his car, or had not been running the same at an excessive speed, the auto could have safely made the crossing. But this does not concern the plaintiff. As to plaintiff the concurring negligence of defendants was the proximate cause of his injury.

Judgment affirmed.

SIMPSON, J., heard the case below, and JAGGARD, J., absent, took no part.

ARCHER-DANIELS LINSEED COMPANY v. BLUE RIDGE DESPATCH and Others.[1]

February 3, 1911.

Nos. 16,881—(132).

Unincorporated fast freight line — service of process on agent.

Several foreign railway corporations, having no lines in this state, entered into an arrangement by which they adopted the name "Blue Ridge Despatch," and under that name established an agency in the city of Minneapolis, and appointed an agent, with authority to solicit business for shipment over its lines. In pursuance of such authority, the agent received

[1]Reported in 129 N. W. 765.

[Note] Who may be served in suit against foreign corporation, see note in 23 L.R.A. 490.

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money from shippers, in payment for transporting goods over its lines, issued bills of lading, and designated the point of delivery to the initial carrier in Minneapolis. In an action to recover damages, brought by a shipper whose goods were received by the Blue Ridge Despatch at Minneapolis for through shipment:

Held, service of process upon the agent at Minneapolis was service upon the constituent railroad corporations.

Action in the district court for Ramsey county to recover $1,376.93 damages for failure to ship linseed oil cake from Philadelphia to Holland during the first half of April, 1908, as agreed. The Blue Ridge Despatch and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, two of the defendants, appeared specially and separately moved to set aside the service of the summons upon them by service upon Charles R. Lewis, and to set aside the return of such service. The motions were denied, Kelly, J. From the order denying the motions, the Blue Ridge Despatch and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company took separate appeals. Affirmed.

How, Butler & Mitchell, for appellants.

Durment, Moore & Sanborn, for respondent.

Lewis, J.

This is an action to recover damages for negligence in the transportation of linseed oil cake shipped by plaintiff from Minneapolis to Holland. Summons was served upon C. R. Lewis as agent for the Blue Ridge Despatch, and also upon the same person as agent for Cleveland, Cincinnati, Chicago & St. Louis Railway Company, under section 4110, R. L. 1905. Both defendants appeared specially and made separate motions to set aside the service of the summons, upon the ground that all the railroad companies constituting the Blue Ridge Despatch and defendant railroad company were foreign corporations, not doing business in Minnesota, and therefore not subject to the jurisdiction of the courts of this state. Both motions were denied, and separate appeals were taken.

Defendant railroad company is a foreign company organized under the laws of Ohio, with its principal place of business in that

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state. Its lines extend through the states of Illinois, Indiana, Michigan, and Ohio, but not into Minnesota. It has no property in this state, other than the office paraphernalia.

The Blue Ridge Despatch is a name used to designate what is called the fast freight route. It is not a corporation, but is a consolidation of several foreign railroad soliciting agencies; i. e., the Chesapeake & Ohio Railway Company, Philadelphia & Reading Company, the Western Maryland Railway Company, the Norfolk & Western Railway Company, and defendant company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Its object is to secure prompt connection and quick service in the transportation of through freight over said lines under joint tariffs filed with the Interstate Commerce Commission by said companies. For that purpose soliciting agents are appointed in different states and localities, whose duties are to solicit and route all freight. C. R. Lewis, of Minneapolis, is one of such soliciting agents, and he has no other authority than the soliciting of freight and the routing of the same over said lines, or some combination of them.

For the purpose of routing freight over said lines the agent selects the local railroad over which the initial carriage is to be performed out of this state, receives the money for the through traffic, and issues a bill of lading. The expenses of the local agent's office and his salary are prorated among the lines constituting the Blue Ridge Despatch. The Blue Ridge Despatch has no income other than the prorated expense, and no property in the state of Minnesota except the office supplies and furniture for conducting the business as above described. The local agent has no authority to quote special rates, and he applies to the general agent of the Philadelphia & Reading Railway Company at Chicago for quotations and all rates in reference to export shipments. Freight is never delivered to the Blue Ridge Despatch as such, but is delivered to an initial local carrier in Minnesota.

In this case an export bill of lading was issued by Mr. Lewis, and the freight charges for the entire distance from Minneapolis to Holland were prepaid to him. He selected the Chicago, St. Paul, Minneapolis & Omaha Railway as the initial carrier, and the bill

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of lading reads, "received at Minneapolis, Minnesota, by C., St. P., M. & O. R. R.," and was executed by Mr. Lewis as follows: "C. R. Lewis, on behalf of the carriers severally, but not jointly." It is alleged in the complaint that six hundred tons of oil cake, of the value of $18,600, were shipped from Minneapolis in this manner, and that the charges were prepaid, amounting to $2,000, that the defendants had failed to comply with their contract, and that plaintiff was damaged in the sum of $1,376.93.

Appellant relies upon the authority of Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916, Earle v. Chesapeake & O. Ry. Co. (C. C.) 127 Fed. 235, and Goepfert v. Compagnie Generale Transatlantique (C. C.) 156 Fed. 196, and also maintains that the case is governed by North Wisconsin Cattle Co. v. Oregon Short Line R. Co., 105 Minn. 198, 117 N. W. 391.

In the North Wisconsin Cattle Co. case that action was brought in the district court of Hennepin county to recover damages for the depreciation in value of a train load of stock occurring in the state of Idaho, and the essential facts relied upon by the defendant in that case to constitute "doing business" within this state were as follows: Collins and Carter maintained an office in the city of Minneapolis. Their business was to influence shippers of freight and prospective passengers to use the lines of the Union Pacific Railway Company. They simply induced people doing business with local companies to route their goods or to take passage or to buy tickets over the Union Pacific line. They made no contract with shippers or passengers. They did frequently act as the agent of a purchaser, and secure from a local company a ticket routed over the Union Pacific. It was held that such business amounted to nothing more than soliciting business for the foreign company.

If in that case (it is argued) soliciting business and accepting money from a passenger was not "doing business," then in this case the acceptance of money from the shipper and the issuance of a bill of lading was not doing business. As we understand the argument, it is: If in the North Wisconsin Cattle Co. case the solicitor was the agent of the shipper or prospective passenger in taking his money and procuring a ticket, then in this case he was also the agent of

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the shipper in taking his money and routing the goods, and the additional act of issuing a bill of lading did not constitute the transaction "business" within the meaning of the statute.

In Green v. Chicago, B. & Q. Ry. Co., the action was brought to recover damages for personal injuries alleged to have occurred in the state of Colorado, and the court held that an action did not lie against the company in the circuit court for the eastern district of Pennsylvania, because it was not transacting business within that jurisdiction. The party upon whom the service was made had an office in Philadelphia, and was designated as district freight and passenger agent. His business was to solicit and procure passengers or freight to be transported over the road, which had its commencement in Chicago. He sold no tickets and received no payments for transportation of freight. When a prospective purchaser desired a ticket and applied to the agent for one, he took his money and procured from one of the railroads running west from Philadelphia a ticket and a prepaid order, which gave the applicant, when he arrived at Chicago, the right to receive a ticket over that road. In some cases, for the convenience of shippers who had received bills of lading from the initial carrier, he gave in exchange therefor bills of lading over the defendant's line, and in these bills of lading it was recited that they should not be in force until the freight had actually been received by the Chicago, Burlington & Quincy road.

The court said that one element of the sufficiency of the service was whether the facts showed that the company was doing business within the district. "It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. * * * The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it" —citing Earle v. Chesapeake & O. Ry. Co. (C. C.) 127 Fed. 235, and other cases.

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In the Earle case the railroad company was organized under the laws of Virginia and did not operate any line in Pennsylvania. There was a somewhat similar arrangement for soliciting freight as is provided in the present case. The court held that the corporation maintained no offices in Pennsylvania, and that the occasional giving of information to one of the directors, who was the chairman of the finance committee, by the secretary, and the infrequent receipt or posting of a letter, did not bring the corporation itself within the jurisdiction. As we understand the statement of the case in the opinion, the soliciting agent did not have the authority and did not receive money and issue bills of lading. In this case, also, the cause of action did not arise within the jurisdiction of the Pennsylvania court, where the corporation was sued.

North Wisconsin Cattle Co. v. Oregon Short Line R. Co. is not controlling. The facts were different. It has become a settled principle that, where the business of an agent is merely to solicit business or to advertise the company, such acts of solicitation do not constitute "doing business." But it is quite a different thing to open an office and induce prospective shippers to transact business with the company through such office, which receives money from the shipper, issues bills of lading, designates the route, and causes the goods to be delivered to an initial carrier designated by him. This is the transaction of business within the state, at least so far as it may concern the shippers.

It is not necessary to decide that appellants are subject to service of process in all cases arising outside of this jurisdiction. We limit this decision to the particular facts, and hold that Mr. Lewis was the agent of appellants so far as the transaction involved was concerned. This construction of the statute is justified by the rules of comity which prevail between different states.

Appellant is entitled to bring actions in the courts of this state to enforce its rights growing out of transactions within its borders; hence, having opened an office herein, and induced the public to transact business with it, it is just that it should be subjected to the process of our courts. As stated in Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. 407, if, upon prin-

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ciples of law and comity, foreign corporations are allowed to do business and maintain suits in another state, the general rule should be that they are liable to be sued in the same jurisdiction. If our courts admit and vindicate their rights, justice also admits and insists that we enforce their liabilities.

Affirmed.

JAGGARD, J., took no part.

THOMAS LEE v. H. N. LEIGHTON COMPANY.[1]

February 3, 1911.

Nos. 16,901—(235).

Material designated for construction of scaffold — duty of master.

When a master sets apart and designates specific material for scaffold building, he is required to exercise due care in seeing that it is free from defects; and the workmen who construct a scaffold from such materials are justified in assuming that the material is reasonably suitable for the purpose.

Contributory negligence — general denial.

Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831, holding that the contributory negligence of plaintiff is not put in issue by a general denial, distinguished.

Action in the district court for Hennepin county to recover $5,152 for personal injuries. The facts are stated in the opinion. The case was tried before Holt, J., and a jury which returned a verdict in favor of plaintiff for $725. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Wilson, Mercer, Swan, Ware & Stinchfield, for appellant.

James A. Peterson and *Paul J. Thompson,* for respondent.

[1] Reported in 129 N. W. 767.

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LEWIS, J.

Respondent was engaged in shingling the porch of a house, and was standing on a plank, when it parted in the middle and let him fall, about ten feet, to the ground. The plank had been spliced with glue and screws, and parted on account of insufficient fastening. This action was brought to recover damages, based upon the charge that the master was negligent in furnishing improper instrumentalities—that is, a defective plank—with which to construct the scaffold. The defense was a general denial, that appellant had furnished plenty of suitable material for the construction of scaffolding, and that if respondent, or his fellow servants, selected a defective plank, which caused his fall, it was the result of their own negligence, and not that of the master. The court submitted the question to the jury, to determine whether, under the circumstances, the material furnished was the providing of instrumentalities such as the master was required to furnish, and whether, in this instance, appellant exercised due care in its selection. The court also submitted to the jury the question whether the respondent might have, by the exercise of proper care, discovered that the plank was spliced and was unsuitable. The jury found a verdict for respondent, and in our judgment no substantial errors were committed in the rulings of the court at the trial, nor in the charge.

We do not consider the evidence clear that there was a general supply of other material on the ground, from which respondent might have made a better selection. There was evidence to the effect that there were two of these treacherous planks, both spliced in the same manner; the splicing being neatly done and concealed with paint, so that ordinary observation would not discover it. As we understand respondent's testimony, he did not discover it before the accident. No other planks were furnished to stand on, although there was some old material on the ground that had been taken out of the house; but none of that material had been designated or set aside for scaffold purposes. There is no doubt but that appellant intended that the materials which contained this plank were to be used for scaffolds, and the burden was on him to prove that he was free from negli-

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gence in permitting so defective an instrumentality to be used for such purposes.

This case is clearly different from those where the workmen were required to select material from a mass. In that class of cases the judgment is called into action; here it was not. When the workmen are required to make their own selection, they do so at their peril; but, when the master performs that duty for them, they have a right to assume that he has acted with due care. The principle is the same as when the master furnishes a scaffold complete and invites his workmen to go upon it. Here the duties were divided. The master selected and set apart the material for the scaffold, and the workmen were required to construct it. If it had fallen by reason of improper construction, the master would not have been liable. The cause of the fall was defective material; hence the master is liable. Farrell v. Eastern, 77 Conn. 484, 59 Atl. 611, 68 L.R.A. 239, 107 Am. St. 45, Donahue v. Buck, 197 Mass. 550, 83 N. E. 1090, 18 L.R.A.(N.S.) 476, and Hoveland v. National Blower Works, 134 Wis. 342, 114 N. W. 795, 14 L.R.A.(N.S.) 1254, fairly illustrate the rule.

While a witness for defendant was under examination, he was asked this question: "Would you consider it [the plank] safe for a man to work on?" The question was objected to on the ground that it was incompetent, irrelevant, and immaterial. "The Court: Do you allege contributory negligence? Counsel: No; our answer is general denial. The Court: Objection sustained." Appellant insists that this line of questioning should have been permitted, for the reason that the question of respondent's contributory negligence was put in issue by the general denial. This question was recently discussed and decided in Hill v. Minneapolis Street Ry. Co., 112 Minn. 503, 128 N. W. 831, contrary to the views of appellant.[1]

We have examined the other assignments of error, and find nothing requiring especial attention.

Affirmed.

JAGGARD, J., took no part.

[1] See opinion on page 376, infra.

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On February 7, 1911, the following opinion was filed:

PER CURIAM.

Since filing the opinion in this case our attention has been called to an oversight which requires correction. In the closing part of the opinion we referred to the case of Hill v. Minneapolis Street Ry. Co., 112 Minn. 503, 128 N. W. 831, as controlling the twelfth assignment of error. Upon re-examination of the case, the complaint discloses that it was alleged that the plaintiff was without fault or negligence. With this allegation in the complaint, the general denial put the question of contributory negligence of plaintiff in issue, and the Hill case is not applicable. This makes it necessary to notice the assignments referred to.

Although the trial court gave as a reason for its ruling that the answer did not allege the contributory negligence of plaintiff, we discover no error in the ruling, for two reasons: (1) Because the witness had already practically answered the same question; and (2) because the exclusion of evidence not obviously material is not a ground for a new trial. Dunnell, Minn. Dig. § 9717.

CARRIE M. LA PAUL and Another v. FRANK HEYWOOD.[1]

February 3, 1911.

Nos. 16,919—(170).

Improvements on leased land — payment of taxes.

Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord.

Taxation — separate appraisal of improvements.

In assessing any tract or lot of real property, the value of all structures and improvements thereon must be determined separately; but for the pur-

[1]Reported in 129 N. W. 762.

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pose of taxation the structures and improvements are considered a part of the realty, and are assessed as such.

Payment of taxes by landlord — recovery from tenant.

Where no provision is made for the payment of taxes in a lease of real estate, and the lease provides that the structures or improvements put upon the lot by the lessee are removable, and the landlord is compelled to pay the entire amount of the taxes to save the property from being sold at tax sale, an action may be maintained by him against the tenant for the recovery of that portion of the tax levied upon the improvements.

Action in the district court for Hennepin county to recover $886, amount alleged to be due for unpaid rent and for taxes paid by plaintiff upon certain real property. The facts are stated in the opinion. From an order, Hale, J., sustaining defendant's demurrer to the second cause of action, plaintiffs appealed. Reversed.

T. J. Stevenson, for appellants.

Arthur M. Higgins, for respondent.

Lewis, J.

Appellants were the lessors of a certain lot, and brought this action to recover certain taxes upon the improvements made by respondent as lessee, which amount appellants claim to have paid in order to prevent the property from being sold for taxes. The complaint states that the lot was leased for a period of ten years, with the privilege of renewal for another ten years; that by the terms of the lease respondent was obligated to erect on the lot, at his own expense, a two-story building, which he was at liberty to remove at the termination of the lease; that in pursuance of the agreement a building was erected at a cost of $30,000, which was separately valued and assessed for the taxes of 1906, 1907, and 1908, but the land and improvements were taxed together as one property; that respondent refused to pay the taxes upon the improvements for the years above mentioned; and that in order to prevent the property from being sold for taxes the appellants were compelled to pay and did pay the entire tax, amounting to $565.40. The complaint also contained an allegation that the respondent had agreed to pay all taxes above a certain valuation, and had refused to do so. The complaint was

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demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, and appellants appealed from an order sustaining the demurrer.

Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. 1 Tiffany, Landlord & Tenant (1910) § 141; Jones, Landlord & Tenant (1906) § 412; 2 Underhill, Landlord & Tenant (1909) pp. 1006–1008; 1 Taylor, Landlord & Tenant (1904) § 341; Phinney v. Foster, 189 Mass. 182, 75 N. E. 103; 24 Cyc. 1075. There is no provision of law by which the owner of land can pay the taxes, without at the same time paying the taxes upon all improvements located on the land. Under the law of Minnesota all buildings and improvements are for the purpose of taxation considered a part of the real estate, and must be assessed as such. Section 796, R. L. 1905. The assessor is required to view the premises, and to determine the true and full value of each tract or lot, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description. Section 808. But in assessing any tract or lot of real property, the value of the land, exclusive of structures and improvements, shall be determined, and also the value of all structures and improvements thereon, and the aggregate value of the property, including all structures and improvements. Section 810. Of course, taxes assessed upon real property are a perpetual lien thereon, and all structures thereon. Section 975.

It necessarily follows, from these provisions and rules of law, that when a tenant under such a lease refuses to pay the taxes upon the improvements owned by him, and the landlord is compelled by law to pay the same to save his own property from sale, an action may be maintained against the tenant for the recovery of the money so paid. Our statute specifically provides for such an action. R. L. 1905, § 984. The essential facts to constitute such a cause of action are stated in the complaint. The lease makes no mention of the payment of taxes. The lessee placed improvements upon the lot to the value of $30,000, which by the terms of the lease were removable by him at the expiration of his term. The amount of the taxes for

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certain years on such improvements is stated with sufficient clearness. The lessee refused to pay his portion of the taxes, and the lessor paid them in connection with his own, in order to save the property from being sold.

It is only proper to state that the learned trial court appears to have sustained the demurrer upon the ground that the agreement to pay the taxes, as pleaded, was invalid, and the attention of the court was not called to the statute and rule of law upon which we hold the complaint sufficient.

Reversed.

JAGGARD, J., took no part.

ELLEN HAAS v. ST. PAUL GASLIGHT COMPANY.

ADDIE KELLY v. SAME.[1]

February 3, 1911.

Nos. 16,933, 16,935—(223, 225).

Escape of gas — verdict supported by evidence.

In an action for damages for negligently permitting gas to escape into the dwelling of plaintiffs, by reason of which a fire was started therein, injuring their persons and property, it is *held* that the verdict is supported by sufficient competent evidence, and that there were no errors in the charge of the court justifying a new trial.

Two actions in the district court for Ramsey county, one by Ellen Haas to recover $3,869.50, and the other by Addie Kelly to recover $5,000, for personal injuries and damage to personal property resulting from an explosion of gas alleged to have been caused

[1]Reported in 129 N. W. 759.

[Note] Negligence in the escape and explosion of gas, see note in 29 L.R.A. 337.

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by defendant's negligence. The answer in the Haas case admitted that on or about the time in question the gas meter had been removed by defendant, and the gas service discontinued; alleged that whatever injuries plaintiff sustained, if any, were caused not by defendant's negligence, but by the acts of plaintiff or persons other than defendant, its agents or employees; alleged that it had no knowledge sufficient to form a belief as to the extent to which the household furniture and wearing apparel were damaged by fire. The answer in the Kelly case denied that plaintiff was injured in person and property to any extent whatsoever. The cases were tried together before Orr, J., and a jury which returned a verdict for $2,069.50 in favor of Ellen Haas, and one for $1,200 in favor of Addie Kelly. In each case defendant appealed from an order denying its motion for a new trial. Affirmed in each case.

How, Butler & Mitchell, for appellant.

Edgerton & Edgerton, John D. O'Brien and *Dillon J. O'Brien,* for respondents.

Brown, J.

These actions were brought to recover damages for personal injuries and for damage to personal property alleged to have been caused by the negligence of defendant. Both actions are predicated upon the same act of alleged negligence, and by consent of the parties were tried together. Each plaintiff had a verdict, and defendant appealed from an order made in each case denying its motion for a new trial.

It is contended by defendant that the court below erred in denying a new trial for the reasons (1) that the evidence is insufficient to sustain the verdict, and (2) errors in the charge of the court to the jury.

1. Plaintiffs resided in a dwelling house situated on Pleasant Avenue, in the city of St. Paul, as tenants. Mrs. Kelly occupied with her family the lower floor, and Mrs. Haas the upper floor. The building was equipped for gas, which was supplied by defendant. On April 29, 1908, Mrs. Kelly, having previously rented another

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residence, was preparing to remove from this building. She had requested defendant to remove the gas meter to her new home, and it was removed by an employee of defendant on the morning of that day. After the meter was removed, the house gradually became filled with gas. It became so strong that Mrs. Kelly, who was engaged in packing her goods for removal, found it necessary to raise the windows to permit it to escape. At about six o'clock in the evening she closed the windows, shortly after which, and at about the time Mrs. Haas lighted a fire in her wood stove on the second floor, an explosion occurred and set the house on fire, seriously injuring plaintiffs, and damaging the property of both. The theory of the case as disclosed by the trial, as respects the negligence relied on for recovery, was that the employee of defendant who removed the gas meter negligently failed properly to shut off the gas, by reason of which it continued to escape, and to fill the entire house, and was ignited by the fire started by Mrs. Haas. It was the contention of defendant below, and again in this court, that the evidence wholly fails to sustain this claim of negligence. We do not concur in this claim. We have read the record, and find therein ample evidence to sustain the allegations of the complaint, and to justify the jury in finding that the sole cause of the fire and resulting damage to plaintiffs and their property was the negligence of defendant's employee, who removed the gas meter and failed properly to shut or turn off the gas. A discussion of the evidence would answer no useful purpose. It is sufficient to say that we have read it with the result stated.

2. We discover no error in the charge of the court. The complaint in each action alleged that immediately preceding the fire, and at the time the escaped gas was ignited, there was a violent explosion. The objections to the charge seem to be predicated upon the theory that the extent of the explosion—that is, the violence thereof—was an essential element in the case, having been made so by the pleadings. Counsel are in error. The gist of the action is that plaintiffs suffered damage from a fire started from gas, which escaped into the building because of the negligence of defendant. It would seem

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wholly immaterial whether the origin of the fire was accompanied by a violent or mild explosion.

Order affirmed in each case.

JAGGARD, J., took no part.

C. H. YOUNG COMPANY v. PETER J. SPRINGER.[1]

February 3, 1911.

Nos. 16,937—(244).

Breach of contract — mistake.

Findings of the trial court *held* not to show a mutual mistake, entitling defendant to equitable relief from the contract for a breach of which plaintiff seeks to recover damages, or that the contract lacked mutuality in its obligations.

Rescission of contract because of mistake.

A contract may be avoided by one of the parties for his own mistake of fact, when such mistake was caused by the inequitable conduct of, or when known to and wrongfully acted upon or taken advantage of by, the other contracting party.

Findings.

The findings of the trial court do not justify relief upon that ground.

Action in the district court for Ramsey county to recover $1,637.46 damages for failure to perform certain tiling and marble work in the construction of the building mentioned in the opinion, after plaintiff had accepted defendant's bid therefor. For a first defense the answer admitted defendant verbally informed plaintiff what the tile work in the building could be done for, but denied the other allegations of the complaint. For a second defense the answer alleged plaintiff requested defendant to go to the office of Butler Brothers,

[1]Reported in 129 N. W. 773.

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and figure the total cost from the plans to be found there, that defendant had been misinformed concerning the scale on which the plans had been drawn, and defendant informed plaintiff of the mistake in his bid, whereupon plaintiff informed defendant it would not expect defendant to do the work. It also set up that Butler Brothers were associated with plaintiff in business. For a third defense the answer set up that the changes made in the proposed work, without the knowledge or consent of defendant, after the gross cost had been figured, wiped out that cost and defendant would have received no consideration for doing the work. The reply was a general denial. The case was tried before Hallam, J., who made findings of fact, as stated in the opinion, and ordered judgment in favor of defendant. From the judgment entered pursuant to the order, plaintiff appealed. Reversed, and new trial ordered.

How, Butler & Mitchell, for appellant.

Barton & Kay, for respondent.

Brown, J.

The facts in the case, as disclosed by the findings of the trial court, are as follows:

A contract for the construction of the Young Mens Christian Association building in the city of St. Paul was awarded to George J. Grant. In preparing his proposal for the contract, Grant obtained from other contractors proposals or bids for different parts of the work. He offered the marble and tile work in one subcontract. Plaintiff in this action, a corporation engaged in marble construction work, contemplated bidding for that part of the work, and solicited defendant, a contractor in tiling, to submit a proposal to plaintiff for the tile work. Defendant thereupon submitted to plaintiff a verbal offer to do the tile work in accordance with the plans and specifications for a stated price per lineal foot for certain parts of the work and a certain price per square foot for other parts. Plaintiff subsequently requested defendant to reduce his offer to a lump or fixed amount, and suggested that he examine the plans and specifications in the office of Butler Brothers, in the city of St. Paul. Defendant made the examination, but, having left his spectacles at

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home, was unable to read them accurately, and he relied in preparing his offer upon statements of their contents made to him by a clerk in the office of Butler Brothers. The plans contained a notation that the scale on which they were drawn was one-eighth of an inch to the foot. The clerk informed defendant, evidently inadvertently, that the scale was one-fourth of an inch to the foot, and upon that defendant made his computations. He thereafter verbally informed plaintiff that he would do the work for $860. Plaintiff claims to have verbally accepted this offer soon after it was made, namely, some time early in 1906.[1] Thereafter, on November 21, 1906, plaintiff submitted to Grant a bid for the marble and tile work, based, as respects the tiling, upon defendant's offer of $860.

Grant subsequently requested some modifications in plaintiff's bid, caused by changes made by the owner of the building to be constructed, and plaintiff in turn requested of defendant a new statement of his offer, which request was in the form of a letter bearing date March 5, 1907, in the following language:

"We have been figuring some little changes in the marble and tile work for the Y. M. C. A. building, and we would like to have a letter from you stating how much per square foot we should allow for the tile floors in toilet rooms. Kindly let us have your written proposal for doing the whole job, and embody in your letter the price per foot to deduct for work which will not be required."

To this defendant replied on March 11, 1907, as follows: "I will furnish and lay tile in Y. M. C. A. building, as per plans and specifications, for $894. For all vit [meaning vitreous] tile cut out, deduct 45 cents per square foot."

Plaintiff made no reply to this last proposal of defendant until October 25, 1907, when it was formally accepted in writing. In the meantime the contract had been awarded by Grant to plaintiff. Shortly after the receipt of plaintiff's letter of acceptance, just referred to, defendant discovered that he had made a mistake in his offer, and notified plaintiff that he would not perform the same. His computations of space to be covered were made on the theory that the plans were drawn on a scale of one-fourth of an inch to

[1] See opinion on page 388, infra.

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the foot, when in fact the scale was one-eighth of an inch to the foot. Defendant's bid was therefore about one-fourth of what it would have been had the correct computation been made. Defendant was misled by the erroneous information given him by the clerk in the office of Butler Brothers, where the plans were when he examined them. The trial court found as a fact that plaintiff did not "actually" know of defendant's mistake until after its bid had been accepted by Grant. The court, however, in its memorandum, states that the modified contract between plaintiff and Grant was not completed until after plaintiff was informed of the mistake and of defendant's refusal to carry out his offer. But this statement, not having been embodied in the findings, cannot be considered as a controlling factor in the case.

In connection with the finding that plaintiff had no actual notice of defendant's mistake, the court found that it ought to have known thereof, and by the exercise of reasonable care and prudence could have ascertained the fact. After the contracts had been entered into some changes were made in the building plans, by the mutual consent of the contractors, plaintiff and Grant, and the owners of the building, by which, among other things, the tile work was materially and substantially reduced. Plaintiff performed its contract, doing both the marble and the tile work. The latter, as reduced by the changes in the plans, was reasonably worth and of the value of $1,630.80, for which amount plaintiff demanded judgment against defendant for his breach of and refusal to perform the contract. Defendant pleaded in defense a mutual mistake in respect to his proposal to do the tile work, lack of mutuality in the contract obligations, and want of consideration. The trial court held that defendant was entitled to equitable relief upon the grounds of mutual mistake and lack of mutual obligations in the contract between plaintiff and defendant. Judgment was ordered for defendant, which was entered, and plaintiff appealed.

The assignments of error challenge certain of the findings of the court, its refusal to modify and amend the same, and the conclusion of law that defendant was entitled to judgment. It is unnecessary to consider all these assignments, for our conclusion, upon

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the facts found, is that the court erred in directing judgment for defendant.

1. The first ground upon which the trial court based its decision was that there was a mutual mistake of fact, justifying the relief granted. In this we are unable to concur. The power of a court of equity to relieve parties from their contracts, upon the ground of mutual mistake of fact, or mutual mistake of mixed law and fact, is well settled and not questioned in the case at bar. To authorize the relief, however, the mistake must be clearly shown to be mutual to both parties, for equity will rarely relieve from the mistake of one of the parties, except in those instances where the mistake was in a measure induced or brought about by the inequitable conduct of, or when known to and wrongfully acted upon or taken advantage of by, the other contracting party. Mutual mistake consists in a clear showing of a misunderstanding, reciprocal and common to both parties, in respect to the terms and subject-matter of the contract, or some substantial part thereof. We fail to discover, from the findings, a mistake of this character.

Defendant prepared and presented his proposal for the work upon his independent judgment and after an examination of the plans and specifications. Plaintiff in no manner assisted in securing the information necessary to a determination of the amount of work to be done, and it does not appear that any of its agents were familiar with the facts in reference to the amount of work or the value thereof. The finding of the court below that plaintiff ought to have known, and with the exercise of reasonable care could have ascertained, the facts, does not bring the case within the rule of mutual mistake. Plaintiff was under no obligation to investigate and discover the mistake. The relations between the parties were not of a character to require of plaintiff efforts to discover whether or not a mistake had been made, and its failure to do so does not deprive it of the right to insist that the contract be performed. But if, as intimated in the memorandum of the trial court, plaintiff discovered or was informed of the mistake by defendant's repudiation of his offer, or possessed knowledge of facts sufficient in equity and good

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conscience to charge it with notice, before finally entering into a contract with Grant, it could well be held that its act in closing the contract, if plaintiff could then withdraw therefrom, or rectify the mistake, would amount to inequitable conduct on its part, within the rule extending relief to the mistaken party in a situation of that kind. Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490; Chelsea v. Smith, 74 N. J. Eq. 275, 69 Atl. 533; Cook v. Liston, 192 Pa. St. 19, 43 Atl. 389. This question, however, is not presented by the findings of the trial court. On the facts stated there was no mutual mistake of fact, and our decision is limited to that consideration. Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564, 10 L.R.A. (N.S.) 114, 117 Am. St. 224; Grant v. Abbott, 142 Wis. 279, 124 N. W. 264; Moffett, Hodgkins & Clarke Co. v. City of Rochester, 91 Fed. 28, 33 C. C. A. 319; Tatum v. Coast, 16 Idaho, 471, 101 Pac. 957, 23 L.R.A.(N.S.) 1109.

2. We also are of the opinion, and so hold, that the court below erred in its conclusion that there was want of mutuality in the obligations and that the contract was therefore not enforceable. While it is probable that defendant's verbal proposal and plaintiff's verbal acceptance thereof were both superseded by the subsequent written proposal and acceptance, it is clear that the latter constituted a valid contract between the parties. Chaplaine v. Gruner, 137 Mo. App. 451, 118 S. W. 665; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. Nor is it material that the offer and acceptance contemplated that changes in the plans of the building might reduce defendant's proposal to such an extent as to leave no work for him to perform. The plans and specifications made provision for changes and alterations, and defendant was informed of and well understood that fact. His offer must therefore be taken to have been made subject to the exercise of that right by the owner of the building. Unless changes and alterations were made entirely eliminating the tile work, defendant was entitled to perform the same, and plaintiff, to whom the contract was awarded, would have been liable as for a breach of the contract had it refused him the right to do so. The consideration necessary to support the contract is

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found in the offer of defendant to do the work and plaintiff's acceptance of the same.

3. This covers all questions necessary to be considered. It is not a case where judgment should be ordered for plaintiff, and a new trial will be awarded.

Judgment reversed and a new trial ordered.

JAGGARD, J., took no part.

On February 17, 1911, the following opinion was filed:

PER CURIAM.

Attention is called in a petition for a rehearing to an error in the opinion wherein it is stated that "plaintiff claims to have verbally accepted this offer * * * early in 1906." The date given should have been 1907, but is not important for the subsequent written acceptance completed the contract. Counsel are in error in the suggestion that this court may look to the evidence and be guided thereby as to facts not embraced within the findings. The findings of the trial court control the disposition of the case in this court.

Application for rehearing denied.

A. L. OBER v. CHARLES H. BREWSTER.[1]

February 3, 1911.

Nos. 16,946—(242).

Transfer of property in anticipation of death — action by administrator to set aside.

In an action brought by an administrator to set aside the transfer of personal property made by the intestate in anticipation of death, *held*, the evidence justified the court in finding that the property was transferred to a third party in trust to pay the expenses and debts of the intestate after his

[1]Reported in 129 N. W. 776.

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death, and to distribute the balance among the members of his family; that the wife and children acquiesced in this disposition of the property; and, ample provision having been made by the order of the trial court for the payment of the creditors, the record furnishes no ground for grievance on the part of the administrator.

Action in the district court for Olmsted county by the administrator of the estate of William Swarts, deceased, to have certain assignments and transfers of property adjudged fraudulent and void as against the creditors and widow of the deceased. The answer admitted the appointment of the administrator, and assignments to defendant and the allowance of two claims against the estate by the probate court, from the allowance of which appeals had been taken, and in case one claim was allowed on appeal, an offer to pay the same. The case was tried before Snow, J., who made findings that there was no conspiracy or intent to defraud in the transfers from Swarts to Brewster; that no consideration was paid therefor and that the transfers were valid and binding, except as against existing creditors and Swarts, and ordered that defendant pay plaintiff the sum of $128.77, to be paid to a specified creditor of the estate. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Joseph Underleak and *Callaghan & Granger,* for appellant.

Burt W. Eaton and *O. E. Hammer,* for respondent.

Lewis, J.

William Swarts, a resident of Olmsted county, died January 23, 1908, intestate, leaving a wife and five children. In May, 1907, he was the owner of certain notes and mortgages amounting to $5,766, and he assigned and delivered them to his son-in-law, Mr. Brewster, with directions to pay his wife $1,500, and to divide the balance equally among his five children, after paying his funeral expenses and $18 to an attorney. The administrator commenced this action on behalf of the widow and creditors to set aside the transfers upon the ground of conspiracy to defraud.

The court found that there was no fraud in the transaction, and that the assignments were made to Brewster in trust as above stated;

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that he collected and had in his possession $5,575, after paying expenses as directed. Two claims were filed against the estate, one by the attorney for $121, and another for $165. The court found against appellant in all respects, and retained jurisdiction of the cause until the claims pending before the probate court should be determined.

The findings are supported by the evidence. The wife acquiesced in the arrangement, and all the children were content with the disposition of the property. Ample provision was made to take care of the pending claims, and we fail to see upon what ground the administrator can maintain this action. It is unnecessary to discuss the evidence.

Affirmed.

JAGGARD, J., took no part.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. EMIL R. REHNKE.[1]

February 3, 1911.

Nos. 16,949—(53).

Railroad right of way — release of claims for damage.

A deed conveying to a railway company a strip of land across a farm in terms released all claims for damages to the balance of the land occasioned by locating and constructing a railway over the strip conveyed. The railway company thereby acquired the right to make a solid fill beneath its tracks, and any resulting damages to the remainder of the farm through the loss of view from one side of the track to the other was released. Such damages, therefore, cannot be assessed in a subsequent condemnation proceeding instituted by the railway company to acquire additional width of right of way for slopes for such fill.

[1]Reported in 129 N. W. 771.

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Proceedings in the district court for Goodhue county to condemn a strip of land on each side of plaintiff's present right of way. The case was tried before Crosby, J., and a jury which returned a verdict in favor of defendant for $125, the value of the land, and $375 damages. From an order denying plaintiff's motion to strike out the item of $375 in the verdict or for a new trial, it appealed. New trial granted unless, within twenty days after a remittitur is filed in the district court, respondent files his consent that the verdict be reduced to $125, in which case the order appealed from is affirmed and judgment entered on the verdict as reduced.

F. W. Root and *F. M. Wilson,* for appellant.

Mohn & Mohn, for respondent.

SIMPSON, J.

In 1902, in consideration of $350, Emil R. Rehnke, the respondent herein, and his wife, conveyed to the Chicago, Milwaukee & St. Paul Railway Company, the appellant herein, a strip of land one hundred feet wide across the farm then occupied and owned by respondent, and in said conveyance released all claims for damages accruing to all their other lands by reason of, or occasioned by, the locating and constructing of a railway over and upon the premises conveyed. Thereafter the said railway company constructed, and has since operated, its railroad over the strip of land so conveyed. For a portion of the distance across respondent's land the railway tracks were supported by a trestle, the trestle at one point being more than forty feet in height. The company, desiring to replace this trestle for some distance by an earth fill, instituted condemnation proceedings to acquire an additional strip twenty-five feet wide on each side of its right of way for slopes of such fill.

The matter came before the district court upon appeal from the award of the commissioners in that proceeding. At the close of the trial the jury were instructed as follows: "The only damage claimed here, aside from the land taken, is the obstruction of view. Will the taking of this land result in the obstruction of the view from one part of the farm to the other, that would not be obstructed if this land was not taken? If so, does that lessen the value of the farm as

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a whole? If so, Mr. Rehnke is entitled to compensation for the amount that it would be lessened in that respect, in addition to the actual value of the land. That is all there is to this case." The jury found that the value of the land taken was $125, and awarded, in addition thereto as damages, the sum of $375.

The railway company appealed from an order denying its motion for a new trial. By various assignments of error the single question is raised: Was the respondent entitled to compensation in the condemnation proceedings for damage that resulted to his farm by reason of the obstruction of view caused by a fill under the railway tracks? The theory upon which the claim that he was entitled to such damage is based is that the purpose of the company, in condemning the additional strips of land, was to make possible a dirt fill under its tracks, and that the injury by reason of cutting off the view of one part of the farm from the other part was attributable to the taking of such additional strips.

The general rule is, as claimed by respondent, that when a railway company, by condemnation proceedings, seeks to take a strip of land for use in the construction and operation of its road, the property owner is entitled to the whole damage which he actually sustains by reason of the appropriation of his land and the construction of the road. Minneapolis, St. P., R. & D. Ele. T. Co. v. Harkins, 108 Minn. 478, 122 N. W. 450. And if an additional strip is taken along an existing right of way, the depreciation in the value of the remaining land by reason of the taking of the additional strip may be recovered. Redmond v. St. Paul, M. & M. Ry. Co., 39 Minn. 248, 40 N. W. 64.

But neither this rule nor the cases cited by counsel for respondent reach the question here involved, which is: Had the respondent once been compensated for the exact damage caused to the remainder of his land, which is here sought to be again recovered in the condemnation proceedings? The question of any general damage to respondent's farm by reason of taking the additional strips was not submitted to the jury. The only damage that they could under the charge find was that caused by the obstruction of view.

The railway company, by purchase, had acquired the right to

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construct and operate this road across respondent's farm. There was, in the deed of conveyance, no limitation as to the manner in which the road was to be constructed, and no reservation by respondent of any right of view beneath the tracks. On the contrary, the deed released all damages caused by the construction and operation of the railway, and provided that the grant to the railway company was upon no other consideration than that named therein, and that the railway company had made no agreement, promise, or condition for or relating to any crossing, passageway, or other privilege over, across, or under said railway. By this original conveyance the respondent gave to the railway company the right to obstruct the view, as it might be obstructed by any usual or ordinary construction of railway tracks, between the part of the farm on one side of the railway track and the part of the farm on the other, and thereby surrendered all claim to damages caused by the exercise of such right. The fact that the tracks were first supported by a trestle did not deprive the company of the right to change the character of that support at any time, and it is apparent that various kinds of walls or fills, which would completely obstruct the view, could be made without acquiring additional land. The fact that the company could more conveniently exercise the right to make a solid fill under its tracks by securing additional land does not make the taking of the land the foundation of the right, but a mere incident in its exercise.

The right to obstruct the view between the different parts of the farm having been acquired by deed was not being acquired by the present condemnation proceedings. Therefore damages for such obstruction were improperly included in the verdict of the jury.

Ordered, that a new trial be granted unless, within twenty days after a remittitur is filed in the district court, the respondent herein files his consent that the verdict be reduced to $125, in which case the order appealed from is affirmed, and judgment may be entered on the verdict as thus reduced.

JAGGARD, J., took no part.

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CHRISTIAN TOSTASON v. MINNEAPOLIS THRESHING MACHINE COMPANY.[1]

February 3, 1911.

Nos. 16,954—(229).

Contributory negligence.

Held, in this a personal injury action, that the undisputed evidence conclusively shows that the plaintiff was guilty of contributory negligence and assumed the risks.

Action in the district court for Hennepin county to recover $12,500 for personal injuries. The answer was a general denial. The facts are stated in the opinion. The case was tried before Brooks, J., who directed a verdict in favor of defendant. Plaintiff's motion for a new trial was denied, Holt, J. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

Homer Morris, for appellant.

Brown, Albert & Guesmer, for respondent.

START, C. J.

Appeal by the plaintiff from a judgment of the district court of the county of Hennepin in a personal injury action, which was brought to recover damages for injuries received by him while in the employ of defendant in its factory, on November 26, 1906, at eleven a. m. The plaintiff, at the time he was injured, was seventy-eight years old. He had been employed in manufacturing plants for some forty years, and in the plant of the defendant for thirty years. He was the defendant's foreman for many years, but for four years next before he was injured he worked in its pattern shop, on the second floor of the machine shop.

He was injured in another building, known as the supply house, in which there was an electric freight elevator governed by a con-

[1]Reported in 129 N. W. 593.

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tinuous rope, which was sent up or down by pulling the rope down or up. It also had a guide rope by which it could be stopped, but when it reached the bottom or basement floor it would stop automatically. It was an ordinary freight elevator, open, with no gates or barriers, and intended only to be used for freight and by those in charge of it. The plaintiff, however, had been accustomed nearly every day for three years to use the elevator whenever he had occasion to go to a water-closet. There were three of them. It was not necessary for him to use the elevator for this purpose; but it was, as he claimed, more convenient for him, and safer to do so than to use the stairways provided by the defendant. On the morning he was injured he stepped on the elevator, which was standing even with the second floor, pulled the rope, and walked to the middle of the platform. The elevator for some unknown cause stopped before it reached the level of the basement floor, and some twenty inches above it. He thought that it had reached the bottom, and without looking, or paying any attention to where he was going, he stepped off and fell to the floor, breaking his hip joint.

The grounds upon which the plaintiff claimed the right to recover were that the elevator well was not protected by any barrier, as required by R. L. 1905, § 1815; that the basement was insufficiently lighted; and that the machinery of the elevator was in a defective condition, which caused it to stop. The defendant, at the close of the evidence on behalf of the plaintiff, moved the court to direct a verdict for it, on the grounds that no actionable negligence had been shown on its part, and, further, that it conclusively appeared from the evidence that the plaintiff assumed the risks and was guilty of contributory negligence. The trial court, without passing on the question of the plaintiff's contributory negligence, or whether he assumed the risks as a matter of law, granted the motion and directed a verdict for the defendant, on the grounds that no negligence on its part had been shown; that the evidence was not sufficient to show that the light in the basement was not sufficient to have enabled the plaintiff to have seen the floor from the place where he fell, nor to show that the defendant was negligent in reference to the machinery; and, further, that the plaintiff was not with-

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in the class intended to be protected by the statute. The plaintiff made a motion for a new trial, which was denied, and judgment entered.

The sole question presented by the record is whether, for any reason stated in the motion, the trial judge was justified in directing a verdict for the defendant.

The reason stated by the learned trial judge in support of his conclusion that the plaintiff was not within the class intended to be protected by the statute was this: "The statute was evidently enacted for the benefit of those who might or may step into the elevator hole or well. If the purpose of the statute was to protect those riding on the elevator, it would require a well hole to be inclosed its entire distance between the floors; and not merely four feet from the floor; for the danger would be greater to those who might fall from the elevator at a point above than below the distance specified."

The question thus suggested is not entirely free from doubt, and we do not discuss or decide it, for the reason that we are of the opinion that the verdict was correctly directed, because it conclusively appears from the record that the plaintiff was guilty of contributory negligence and assumed the risks. While the plaintiff and others testified that the light in the basement was dim, yet the whole evidence as to the light, the plaintiff's ability to see, and his perfect familiarity with the premises, conclusively establishes the fact that the light was sufficient to have enabled him to have seen the basement floor before stepping from the elevator, if he had looked. He testified that the light at the time was just the same as it always had been, and that he could see off just as good as he ever could, but had to use glasses to read or do fine work. In short, the evidence is conclusive that by his years of experience in the factory and daily use of the elevator he was fully advised as to the situation, the condition of the elevator as to guards, the amount of light, and fully appreciated the risks incident to its use.

We fully appreciate that the question of contributory negligence or assumption of the risks is a question for the court only in clear and exceptional cases, where only one conclusion can reasonably be

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drawn from the undisputed evidence; but the evidence clearly brings this case within the exception.

Judgment affirmed.

JAGGARD, J., being absent, took no part.

WILLIAM FARRIS v. R. KOPLAU.[1]

February 3, 1911.

Nos. 16,958—(249).

Fraud in obtaining promissory note — failure to instruct jury not a ground for new trial.

The failure of the court to instruct the jury upon all the elements necessary to constitute a defense under section 2747, R. L. 1905, relative to the procurement of negotiable instruments by fraudulent means, is not, in the absence of special requests or proper exceptions at the trial, ground for a new trial.

Same — question for jury.

Evidence *held* sufficient to justify the submission to the jury of the question whether the promissory note in suit was obtained by fraudulent representations and without negligence on the part of defendant.

Ground for new trial — case limited.

A trial court has no authority to grant a new trial for errors not duly excepted to on the trial, or on a motion for a new trial, as provided for by section 4200, R. L. 1905. Bank of Willmar v. Lawler, 78 Minn. 135, limited.

Action in the district court for Clay county to recover $92.92 upon a promissory note. The substance of the answer is stated in the opinion. The reply was a general denial. The case was tried before Baxter, J., and a jury which returned a verdict in favor of defendant. From an order granting plaintiff's motion for a new trial, defendant appealed. Reversed.

[1]Reported in 129 N. W. 770.

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Peterson & Adams, for appellant.
Nye & Dosland, for respondent.

BROWN, J.

This action was brought to recover upon a promissory note, alleged to have been made and delivered by defendant, of which the following is a copy:

"$92.92. Sabin, Minn., Aug. 6, 1908.

"October 1st after date I promise to pay to the order of myself ninety-two 92/100 dollars, at Sabin, Minn. Value received, with interest at the rate of ten per cent. per annum.

R. Koplau."

It was indorsed in blank with the name of the maker and payee, "R. Koplau." The complaint alleged that the note was delivered to the Mutual Life Insurance Company of New York, and the evidence tends to show that it was delivered to an agent of that company in payment of the first premium on an insurance policy issued upon the life of defendant. The complaint also alleged that before the maturity of the note the insurance company for value sold and transferred the same to plaintiff. The defendant in his answer denied the execution or delivery of the note as alleged in the complaint or otherwise, and further alleged that, if plaintiff had a promissory note of the terms and effect of that described in the complaint, it was procured from defendant by false and fraudulent representations, and by trick, artifice, and fraud. Defendant had a verdict, and the court granted plaintiff's motion for a new trial. Defendant appealed.

1. Plaintiff's motion for a new trial was based upon two grounds, namely: (1) Errors in law occurring on the trial; and (2) that the verdict was not justified by the evidence. The court made a general order granting the motion, without assigning reasons therefor. It cannot, therefore, be sustained as a discretionary order, and we have only to determine whether the evidence reasonably tends to support the verdict, and, if so, whether there were any errors in the rulings

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or instructions of the court of a nature to justify a new trial. Fitger v. Guthrie, 89 Minn. 330, 94 N. W. 888.

2. It is contended by plaintiff in support of the order that the evidence wholly fails to support the defense, and therefore that the verdict cannot stand. While it is true that the evidence fairly shows that plaintiff was a bona fide purchaser of the note, section 2747, R. L. 1905, makes available to defendant the defense of fraud; and the question whether a promissory note was procured by false representations, trick, or artifice is by that statute made a question of fact for the jury. A bona fide holder of negotiable instruments is not protected by his good faith, but takes title subject to this particular defense. We have examined the record, and find therein evidence reasonably tending to support the allegations of fraud, and plaintiff's contention that it wholly fails to make a defense is not sustained.

We also similarly dispose of plaintiff's further claim that the evidence is conclusive that defendant was guilty of negligence in signing the note without first ascertaining its real purpose and effect. The evidence made this a question of fact. It would serve no useful purpose to discuss the evidence. Sibley County Bank v. Schaus, 104 Minn. 438, 116 N. W. 928.

3. It is further contended in support of the order that the court below erred in its instructions to the jury. The statute relied upon by defendant (section 2747) provides that no person shall be liable upon a promissory note or other negotiable instrument executed by him, if he shall make it appear that his signature was obtained by fraudulent representations, trick, or artifice as to the nature and terms of the contract, that he did not at the time of signing the same believe it to be a promissory note or other negotiable instrument, and that he was not guilty of negligence in signing the paper without the knowledge of its terms. It also provides that the question of negligence shall be one of fact for determination by the jury. To constitute a defense under this statute it must be made to appear (1) that the instrument was obtained by fraudulent representations, trick, or artifice; (2) that the maker thereof did not believe he was signing a negotiable instrument; and (3) that he was not

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negligent in signing it without knowledge of its contents. And it is clear that the parties in an action where such an issue is raised have the right to a submission of all these questions to the jury.

In the case at bar the charge of the court was very brief. In substance the court instructed the jury that if the note in suit was obtained from defendant by fraudulent representations, and was fraudulent, defendant was entitled to their verdict; but if they found there was no fraud a verdict should be returned for plaintiff. The court did not say to the jury that defendant was required to make it appear that he was not guilty of negligence in signing the note without knowledge of its terms, and of this plaintiff complains for the first time in this court. No requests for instructions upon that subject were made at the trial, nor was the failure of the court to fully cover the issues excepted to on the trial, or assigned as error in the motion for a new trial. The failure to so charge was not, therefore, error justifying a new trial. The rule is well settled that the failure of the court to cover some particular feature of the case in its instructions is not reversible error, in the absence of special requests therefor. Chamberlain v. Porter, 9 Minn. 244 (260); Ellington v. Great Northern Ry.Co., 92 Minn. 470, 100 N. W. 218; Olson v. Aubolee, 92 Minn. 312, 99 N. W. 1128; Bailey v. Grand Forks Lumber Co., 107 Minn. 192, 119 N. W. 786. The case of Robertson v. Burton, 88 Minn. 151, 92 N. W. 538, has been limited to the special facts of that case, and has not been extended. Bailey v. Grand Forks Lumber Co., supra; Beardmore v. Barton, 108 Minn. 28, 121 N. W. 228.

Nor is the point that the charge of the court taken as a whole was too indefinite and incomplete available to plaintiff. Both parties heard the instructions as given by the court at the trial and were apparently content with the same. No objection on the theory that the charge was indefinite or otherwise not sufficiently comprehensive of the issues was made. The objection comes too late. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

Nor can the order be sustained under the rule of Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868. The trial court in that case granted a new trial upon its own motion, immediately

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upon the return of the verdict, but in the main upon the ground that the verdict was flagrantly against the evidence. The order was sustained. It does not appear in the case at bar that the court granted the new trial on that ground, and it is well settled that a new trial cannot be granted for errors not excepted to in the manner prescribed by law. Valerius v. Richard, 57 Minn. 443, 59 N. W. 534; Weinberg v. Steeves, 82 Minn. 262, 84 N. W. 755. Whatever authority a trial court may possess in respect to setting verdicts aside immediately upon the rendition thereof by the jury, as in the Lawler case, such was not the action of the court in this case. On the contrary, the order was based upon plaintiff's motion specifying the grounds urged in support thereof. That motion controls. It is believed that if the Lawler case is to be extended, and to authorize a new trial upon the motion of the court for reasons other than insufficiency of evidence, it should come about by legislation.

It follows that since the evidence reasonably tends to support the verdict, and no errors were committed on the trial of a character to justify a new trial, the order appealed from must be reversed, and the verdict reinstated. Owens v. Savage, 93 Minn. 468, 101 N. W. 790.

Order reversed.

JAGGARD, J., took no part.

STATE v. WILLIAM GORMAN.[1]

February 3, 1911.

Nos. 16,972—(259).

Absence of accused when verdict was returned.

The defendant was on trial for a felony, and was personally present at all times until the jury retired to consider their verdict. He then left the court-

[1]Reported in 129 N. W. 589.

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room, being on bail, and unlawfully absented himself therefrom. The court, eighteen hours after the jury had agreed upon a verdict, and after exhausting all reasonable means to secure his presence in court, received the verdict in his absence. *Held*, that by his conduct he waived his right to be present, and that the court did not err in so receiving the verdict, nor in asking the jury, when they came into court after they had agreed, to be patient until the defendant arrived.

Defendant was indicted by the grand jury for Hennepin county for the crime of assault in the second degree. The case was tried before Dickinson, J., and a jury which returned a verdict of guilty under the circumstances stated in the opinion. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

John F. Bernhagen, for appellant.

George T. Simpson, Attorney General, and *James Robertson,* County Attorney, for the State.

START, C. J.

The defendant was indicted and convicted in the district court of the county of Hennepin of an assault in the second degree, and it was adjudged that as punishment therefor he be confined at hard labor in the state's prison for a term of five years. He appealed from an order denying his motion for a new trial. The appeal does not involve any question of the sufficiency of the evidence to establish his guilt, or any error in his trial up to the time the jury, through the officer in charge of them, notified the court that they had agreed upon a verdict. The alleged error relied upon for a reversal of the order is that the court erred in communicating with the jury before receiving the verdict, and in receiving it in the absence of the defendant.

The defendant was duly arraigned upon the indictment, pleaded not guilty, gave the usual bail bond, and was released from custody. He was personally present in court when his case was called for trial, and was so present at all times until after the jury were instructed and retired in charge of an officer to consider the case, on April 1, 1910. The jury, on the same day, and at 5:30 p. m., advised the court that they had agreed upon a verdict; but, the de-

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fendant not then being in court, they were kept out all night. On the next morning, at 10:30 o'clock, they were called into court, at which time proceedings were had to the effect following:

"The Court: Send for the defendant. Now, gentlemen, we will have to ask you to be patient until the defendant arrives.

"A Juror: Your Honor, may I address the court?

"The Court: Yes; but we cannot take any verdict, you understand."

A Juror: Well, this seems to be a rather peculiar proceeding. Supposing the defendant does not show up for several days, or weeks; what then? Are we to remain as prisoners?

The Court: We do not want to discuss the case in the absence of the defendant. But you will not be detained a great while longer. You can remain in your places, if you can be more comfortable. I think we will have the courtroom cleared for the present, and keep the jury in this room. Would you rather remain here in this room?

They signified that such was their wish. At 11:45 a. m. the court said to the jury: "The defendant is not present. Ever since the court was informed that you had agreed on a verdict and were ready to deliver it last night, * * * we have been ransacking the town to discover the whereabouts of the defendant. Having exhausted every means to have him here, we will receive the verdict at this time." The jury then returned the following verdict: "We, the jury, find the defendant guilty of the crime of assault in the second degree." The defendant and his sureties were then called and his bond declared forfeited, and a bench warrant issued for his arrest. He was arrested on April 17, 1910, and judgment awarded upon the verdict as stated. He wilfully absented himself from the court from the time of the submission of the case to the jury until finally arrested on the warrant.

Was it error to receive the verdict in the absence of the defendant in view of the exceptional circumstances under which it was received? This is an important question, and one of first impression in this state.

On a trial for a felony the defendant shall be personally present. R. L. 1905, § 5358. The reception of the verdict in such a case is

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a material part of the trial to the defendant; for he is entitled, on request, to have the jury polled. Section 5373. If the defendant be in custody and is not personally present when the verdict is received it is reversible error; for the court, and not he, in such a case commands his jailer. Where, however, he has been released on bail, he orders his own movements outside of the courtroom. Can he in such a case wilfully absent and conceal himself, and then urge that a verdict, received in open court in his absence, after waiting and searching eighteen hours for him after the jury had agreed, is void because he was not present when it was received? This is the precise question presented by the record. We are of the opinion, on principle and authority, that it must be answered in the negative. The defendant cannot take advantage of his own wilful wrong to defeat the ends of justice, and must be held to have waived, by his misconduct, his right to be present when the verdict was received. Com. v. McCarthy, 163 Mass. 458, 40 N. E. 766; Frey v. Calhoun, 107 Mich. 130, 64 N. W. 1047; Sahlinger v. Illinois, 102 Ill. 241; State v. Perkins, 40 La. Ann. 210, 3 South. 647; Stoddard v. State, 132 Wis. 520, 112 N. W. 453; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L.R.A.(N.S.) 603; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Lynch v. Com., 88 Pa. St. 189, 32 Am. Rep. 445.

Many of the cases cited in support of the defendant's contention belong to the class which hold, and rightly so, that where the accused is in custody, and is not present when the verdict is received, it is reversible error. There are, however, a few cases, comparatively, which hold that it is immaterial whether the absence of the accused is voluntary or otherwise, and that a verdict cannot be received in his absence under any circumstances. We cannot follow these exceptional cases, for they are unsound in principle, and an apotheosis of technicality.

It is further urged by the defendant that the statement made to the jury when they came into court was reversible error. We hold otherwise. This was not a case where the judge went to the jury room and communicated with the jury, as was done in the case of Hoberg v. State, 3 Minn. 181 (262), but one where the jury had agreed upon their verdict, and had come into court, and were impatient to deliver

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it. No further instructions were given to the jury, nor any reference made to the case, except an appeal to the jury to be patient until the defendant arrived. It was not until the court had decided to receive the verdict that the jury were informed that the defendant was not present, and that every means to find him had been exhausted, and immediately upon saying this the verdict was received.

Order affirmed.

JAGGARD, J., took no part.

STATE v. TIMOTHY MURPHY.[1]

February 10, 1911.

Nos. 16,766—(36).

Grand larceny — evidence — charge to jury.

In a prosecution for grand larceny, it is *held* that the evidence justified a verdict of guilty, and that the record presents no reversible errors in the admission or exclusion of evidence, or in the instructions of the court to the jury.

Foreign corporation — compliance with Minnesota statute.

In the absence of allegations or evidence to the contrary, it will be presumed that a foreign corporation, doing business in this state, has complied with our statutes.

Larceny of funds of de facto corporation.

An officer or agent of a corporation may be convicted of the larceny of its funds, though there may be some defect in its organization, and it have only a de facto existence.

Defendant was convicted in the district court for Ramsey county of the crime of grand larceny in the first degree. From an order, Hallam, J., denying his motion for a new trial, he appealed. Affirmed.

[1] Reported in 129 N. W. 850.

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James Cormican, for appellant.

George T. Simpson, Attorney General, and *Richard D. O'Brien,* County Attorney, for the State.

BROWN, J.

Defendant was convicted of the crime of grand larceny in the first degree, and appealed from an order denying his motion for a new trial.

The facts, briefly stated, are as follows:

The "Volunteers of America" is a corporation organized and created under the laws of the state of New York. It is a religious association, military in its methods, and having for its object the uplifting of those who have been unmindful of, or who for lack of opportunity have neglected, their obligations to God and society. Though organized in and having its headquarters and principal office in the state of New York, it extends its work by means of branch organizations or agencies, termed "posts," into nearly every state in the Union, and there through the medium of chosen officers and agents carries on its commendable work. Prior to the time involved in this prosecution the society established a branch, or post, at St. Paul, in this state, and defendant, who had voluntarily applied for and been admitted a member of the society, became the captain, or officer in charge. His duties as such are clearly defined by the constitution and regulations of the association, and as a matter of law he became, upon his admission as a member, an agent of the corporation.

During the winter of 1910 defendant conceived the plan of building a home for the working girls of St. Paul, and in furtherance thereof inaugurated a "tag day" for the collection of the necessary funds from charitably disposed persons, designating March 17, 1910, upon which contributions would be solicited. His plans were laid before and approved by the superior officers of the society, and it was subsequently conducted in its name and by its authority. It was, however, under the control of defendant, who called to his assistance other members of the local post. Donations to the fund

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were liberally made by the citizens and aggregated the total sum of $1,900.

Defendant took possession of the money, though there seems to have been a treasurer of the local post, and deposited the same in a St. Paul bank in his own name. It is claimed by defendant the person appointed as treasurer was such in name only, and this is probably the fact; for defendant at all times seems to have had charge of the funds of the local post. Therefore no adverse inference is to be drawn against him from the fact that he deposited the money in the bank in his own name. The name used was "Captain Tim Murphy." On March 21, 1910, the money so collected having all been theretofore deposited, defendant appeared at the bank and presented a check payable to himself for the sum of $1,250, and requested payment thereof in large bills. The request for "large bills" evidently excited the curiosity of the paying teller, and he inquired the reasons for the request, and was informed by defendant that they were wanted in a real estate deal. He was advised to use a check, but replied that he preferred the money. It was given him in the form of two $500 packages, and the balance of $250 in bills of a large denomination. He had appointed a meeting for the evening of that day to discuss with other members of the post plans for the proposed working girls' home. The meeting was held, but no mention was made of the fact that defendant then had on his person $1,250 of the tag day collections, and it does not appear that negotiations for the purchase of land upon which to build the home were to be had at that time.

After the meeting defendant disappeared, and with him the money. He returned to his home on the twenty-ninth of March, and exhibited by his appearance strong evidence of a protracted debauch. The evidence is clear that he proceeded at once to Winnipeg, and there remained until the day of his return. He then had, of the money taken away, $110 in Canadian bills. The balance of the money drawn from the bank has never been returned to the society. Defendant related to his associates his experience during his absence, and claimed that after the meeting on the evening of the twenty-first of March he was seized by two men, who approached

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him in an automobile while waiting for a street car, and chloroformed, kidnapped, and detained him until the day of his return. He professed entire ignorance of his whereabouts in the meantime, and insisted that the money had been taken from him by those men. He was not sworn as a witness on the trial, and his story, given above in a word, appears from the testimony of one of the officers of the society to whom defendant related the facts.

1. The questions presented by defendant in support of the contention that the trial court erred in denying his motion for a new trial require no extended discussion. The claim that the evidence is insufficient to sustain a conviction is not sustained. We have examined the record with care, and find the verdict supported by ample evidence. It fully sustains the theory of the state that defendant deliberately appropriated to his own use the money in question, and, without reviewing it, we concur with the trial court that no other verdict could well have been rendered. We have also examined carefully the assignments of error challenging the rulings of the court in the admission of evidence, and in its charge to the jury, and discover no reversible error.

2. It is contended that the indictment fails to state facts constituting a public offense, and that the court for that reason erred in overruling defendant's objection, made at the opening of the trial, to the admission of any evidence thereunder. The point is that it does not appear upon the face of the indictment that the "Volunteers of America," alleged to be the owner of the money charged to have been stolen by defendant, being a foreign corporation, had complied with the statutes of this state prescribing conditions upon which such corporations may do business in this state. Section 2888, R. L. 1905. The contention is without force. Compliance with our foreign corporation statutes will, in the absence of allegation or evidence to the contrary, be presumed. Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796, 106 Am. St. 443. It appears from the evidence offered at the trial that the society is a religious corporation, and it is doubtful, though some features thereof may tend in that direction, whether it is a corporation for pecuniary profit within the meaning of the statutes. Section 2888,

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R. L. 1905. But, if they are applicable, it is clear that a failure to comply therewith would not have the effect of protecting the agents thereof who unlawfully appropriate its money or property. People v. Hawkins, 106 Mich. 479, 64 N. W. 736; Wilder v. Com. (Ky.) 89 S. W. 732. The money alleged to have been stolen was held by the corporation in trust for the purposes for which it was contributed and the corporation was, within the meaning of the law, the owner of the same. Defendant was its agent, and instrumental in obtaining the money for the purposes stated; and the wrongful conversion thereof by him constituted larceny, whether the corporation, his principal, had authority as a matter of law to engage in the enterprise in this state or not.

Nor is the point that the society was not legally incorporated under the laws of New York available to defendant. It was at least a de facto corporation, and it seems clear that the law will not, by reason of some defect in its organization, permit its funds to be made the subject of plunder by its trusted officers and agents. Braithwaite v. State, 28 Neb. 832, 45 N. W. 247, 25 Cyc. 96.

3. It is also contended that the prosecution must fail for the reason that no demand was made upon defendant for the return of the money. Under the circumstances of this case, as shown conclusively by the evidence, no demand was necessary. It appears clearly from the evidence that defendant feloniously appropriated the money to his own use, and that a demand would have been unavailing. State v. New, 22 Minn. 76, 78; State v. Comings, 54 Minn. 359, 56 N. W. 50; Com. v. Hussey, 111 Mass. 432. The money was in defendant's possession as agent of the society. He deposited it in the bank, to be subsequently used for the particular purpose. There is no claim that he withdrew it from the bank for that purpose, and the inference is conclusive that he drew it for his own private purposes, and at that moment committed the crime charged against him.

This covers all questions requiring special mention, and results in an affirmance of the order appealed from.

Order affirmed.

JAGGARD, J., took no part.

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T. B. DOWNER v. UNION LAND COMPANY OF ST. PAUL and Others.[1]

February 10, 1911.

Nos. 16,824—(209).

Action by judgment creditor of corporation — statute of limitations.

Action by a judgment creditor of the defendant corporation to compel the defendant stockholders to make good, by paying the difference between the par value of their stock and what they paid for it, so far as may be necessary to satisfy the judgment, their alleged false representation, relied on by the plaintiff when he purchased the bonds of the corporation which are the basis of his judgment, that they had paid the full par value of their stock. The bonds contained an agreement that no stockholder should be in any wise liable for the payment thereof and that no bondholder should be entitled to any remedy to enforce payment thereof against any stockholder. *Held*, that it does not appear upon the face of the complaint that the action is barred by the statute of limitations, and that the bond agreement is a defense to this action.

Action in the district court for Ramsey county to recover from defendant land company and its stockholders the balance of plaintiff's judgment, amounting to $3,955.96, with interest; that the agreement by which seventeen thousand shares of defendant land company were issued as full paid stock be adjudged fraudulent and void as to plaintiff; that the court ascertain the true value of the land conveyed to the company in exchange for the stock and the percentage of overvaluation at which the land was so taken, and that plaintiff recover from each of defendants other than the Union Land Company the difference between the par value of the shares of stock owned by each, respectively, and the respective amounts actually paid thereon, taking the land at its true valuation, or so much thereof as may be required to pay the amount adjudged to be due plaintiff. The facts are stated in the opinion. From an order, Hallam, J., overruling plaintiff's demurrer to that part of

[1]Reported in 129 N. W. 777.

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the answer of Ferdinand Willius set out for and numbered as a second defense, plaintiff appealed. Reversed.

James E. Trask, for appellant.

Lightner & Young, for respondents.

START, C. J.

This is an appeal by the plaintiff from an order of the district court of the county of Ramsey overruling his demurrer to the second alleged defense in the answer of the defendant Willius.

The action was commenced in December, 1909. The here material allegations of the complaint, briefly stated, are to the effect following: The defendant Union Land Company, hereafter referred to as the company, is and has been since 1887 a corporation for pecuniary profit duly organized under the laws of this state. On April 5, 1887, it issued seventeen thousand shares of its capital stock, of the par value of $100 each, as full paid to its organizers, of which fifty shares were delivered to the defendant Willius, hereafter referred to as the defendant. The company, after such issue of stock, became indebted in the sum of $98,000, and thereafter, for the purpose of securing the money to pay such indebtedness, it issued its bonds, amounting in the aggregate to $126,000, with ten per cent. annual interest, payable to trustees or bearer February 1, 1894. The plaintiff purchased six of such bonds, each for $500, and paid therefor $3,000, relying upon the representation that the seventeen thousand shares of stock so issued had been paid for in full. None of his bonds, or any part thereof, were paid, except interest to August 1, 1895. He recovered a judgment against the company in the district court of the county of Ramsey, on February 25, 1902, for the amount due on the bonds, $4,979.83. Execution was issued on the judgment and returned satisfied only to the extent of $1,023.87. The balance of the judgment has never been paid and the company is insolvent.

The organizers and stockholders of the company, including the defendant, with the intent of acquiring the seventeen thousand shares of stock as full paid, when in fact they were not, purchased fourteen hundred seventy-six acres of land, for which they paid only $679,-

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289, which was more than it was worth. They caused this land, with cash sufficient to make the price actually paid for the stock not more than $850,000, to be transferred and turned over to the company in payment of the seventeen thousand shares of stock, an overvaluation of the land of more than $790,000. Such valuation was not the result of mistake, but was a gross overvaluation, intentionally made by all the parties to the transaction, with the knowledge of all the past and present stockholders of the company, and with the intent to enable such stockholders to acquire, and they did thereby acquire, each his respective portion of the seventeen thousand shares of the capital stock, by paying to the company therefor not to exceed $50 per share. The seventeen thousand shares so issued are the only portion of the authorized capital stock of the company which was ever issued. The plaintiff did not discover the fraudulent character of the issue of the seventeen thousand shares, and was unable with due diligence to discover the same, until the summer of 1906, and such discovery was then for the first time made after several years of diligent inquiry. The complaint then alleges in detail the steps taken by the plaintiff to ascertain the facts as to the issue of such stock.

The complaint prays, in effect, judgment against the company for the amount due on the original judgment, and that each of the defendant stockholders be required to pay so much of the difference between the par value of his stock and the amount actually paid by him therefor as may be necessary to pay the judgment against the company, and for general relief.

The answer of the defendant avers four alleged defenses, viz.: (1) The stock was in fact fully paid. (2) The plaintiff's bonds contained an express agreement that the stockholders should in no wise be liable for their payment. (3) The action is barred by the statute of limitations. (4) Laches.

The plaintiff replied to all the alleged defenses, except the second, to which he demurred. The trial court overruled the demurrer. The second alleged defense was to the effect: That the bonds of the company drew interest from their date at the rate of ten per cent. per annum, and their payment was secured by a trust deed of all of

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the corporate property. That each purchaser of the bonds, including the plaintiff, entered into an agreement with the company, in consideration of the high rate of interest and the provision for the payment of the bonds, which was included in the body of each bond in these words: "It is a condition of the issue of this bond and the execution of said trust deed that this bond is an obligation of said company only" (meaning said defendant land company) "and that the stockholders of said company shall not, nor shall any of them, be in any wise liable for the payment thereof, nor shall any holder of this bond be entitled to any remedy to enforce payment thereof against any stockholder. The holder of this bond accepts this condition and agrees to the terms thereof." And further, that no representations were ever made to the plaintiff that the shares of stock issued by the company were fully paid, or to any extent, except such representations as may be deemed to have arisen from the mere fact that seventeen thousand shares had been issued as fully paid, of which twelve thousand one hundred thirty-two shares were outstanding when the plaintiff purchased his bonds.

1. The first contention of the defendant in support of the order overruling the demurrer, to be considered, is that the complaint does not allege facts sufficient to constitute a cause of action, for the reason that on its face it appears that the alleged cause of action is barred by the statute of limitations.

A demurrer, as a general rule, searches the record, and judgment will be given against the party whose pleading was first defective in substance. It is not clear that this rule is here applicable, for the reason that the question whether the alleged cause of action is barred by the statute of limitations has become, by the answer pleading the statute and the reply thereto, an issue of fact between the parties. 1 Chitty, Pl. 669; 6 Enc. Pl. & Pr. 332; Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762. This point, however, is not raised by the plaintiff, and we assume, for the purpose of this appeal only, that the demurrer in this case fastens upon the first defective pleading. The question of the sufficiency of the complaint is, then, to be determined as if the demurrer was to the complaint.

It is the settled rule of this court that, in an action for relief on

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the ground of fraud consummated more than six years before the commencement of the action, the complaint must allege facts showing that the fraud was not discovered until within six years next before the action was commenced; that, if it fails so to do, demurrer will lie, but in such a case, if the bar of the statute is not raised either by demurrer or by answer, it is waived. Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Burk v. Western Land Assn., 40 Minn. 506, 42 N. W. 479; Morrill v. Little Falls Mnfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L.R.A. 174; Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838; First National Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110.

A consideration of the allegations of the complaint, as to when the plaintiff discovered the fraud and his diligence in the premises, in connection with the rule stated, has led us to the conclusion that it does not appear upon the face of the complaint as a matter of law that the alleged cause of action is barred by the statute of limitations. The question whether the plaintiff discovered the fraud, or ought to have discovered it by the exercise of reasonable diligence, more than six years before the commencement of the action, is peculiarly one of fact, and was properly made an issue of fact by the pleadings.

2. The pivotal question presented by the record is whether the contract as to stockholders' liability contained in the bonds is a defense on the merits to this action. The demurrer admits the execution of the contract, the consideration therefor, and, therefore, its validity.

Counsel for defendant contend that such contract is an absolute bar to this action, and cite in support of the claim, with others, the case of Brown v. Eastern, 134 Mass. 590, which was an action to enforce the statutory liability of the defendant stockholders for the payment of certain promissory notes of tho company. The statute (Pub. St. Mass. 1882, c. 106, § 61) provided that stockholders who had not paid in full the par value of their shares should be jointly and severally liable for the debts of the co. any. The notes were delivered upon a contemporaneous agreement that there should be no personal liability on the notes. It was held that, as no one was per-

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sonally liable, except by statute, the contract necessarily referred to the statutory liability, and that it was a defense.

Another case relied on is U. S. v. Stanford, 161 U. S. 412, 16 Sup. Ct. 576, 40 L. ed. 751. In this case it was sought to enforce against the estate of Leland Stanford a claim of some $15,000,000 based upon the constitution and laws of California, making each stockholder of a railroad corporation liable for its debts in proportion to the stock held by him. It was held that the liability of stockholders of corporations for bonds issued under the Pacific Railroad acts depended, not upon the laws of California, but upon the acts of congress under which such bonds were issued, which provided that the stockholders should not be personally liable for the debts of the corporation.

The case of Basshor v. Forbes, 36 Md. 154, also cited, was an action to recover from a stockholder of a corporation the amount of its promissory note by virtue of a statute providing that stockholders should be liable for the debts of a corporation to an amount equal to that of their stock "until the whole amount of the capital stock fixed and limited by the corporation shall have been paid in" full. Code Md. 1860, art. 26, § 52. It was held that an agreement, made at the time the note was delivered, that the payee should look only to the corporation and the security for its payment, was a defense.

These cases sustain the proposition that, if a person contracting with a corporation expressly agrees to look only to the corporation and its property for the payment of his debt against it, such agreement will be a waiver of the constitutional or statutory liability of stockholders for the payment of the debt. It is clear that the agreement contained in the bonds, which we have quoted, released the stockholders from any and all liability for the payment of the bonds imposed by the constitution or statute, and from all liability whatever, in the absence of any element of fraud; that is, if they had then paid the full par value of their stock as represented by the issuance of it as full paid. This is not an action to enforce any constitutional or statutory liability of the defendant for the payment of

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the bonds; but it is, in effect, one to compel the defendants to make good, so far as may be necessary to satisfy the plaintiff's judgment against the corporation, their alleged representation, alleged to have been relied upon by him, that the assets of the corporation had been increased to the full par value of their stock, when in fact only one-half thereof had been paid.

The question, then, in its last analysis, is whether such a liability was within the contemplation of the parties when the bond agreement was made, and did the plaintiff thereby waive such liability in case he might thereafter discover for the first time the facts upon which liability must rest? The right of a creditor to maintain such an action is settled by the repeated decisions of this court. First National Bank v. Gustin M. C. M. Co., 42 Minn. 329, 44 N. W. 198, 6 L.R.A. 676, 18 Am. St. 510; Hospes v. Northwestern M. & C. Co., 48 Minn. 174, 50 N. W. 1117, 15 L.R.A. 470, 31 Am. St. 637; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; Wallace v. Carpenter Ele. H. Mnfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. 530.

The basis of the action is not contract, but fraud, for the reason that: People deal with the corporation and give it credit on the faith of its stock, and they have the right to assume that it has a paid-in capital to the amount which it represents itself as having. If the representation is false, it is a fraud on creditors; and, in case the corporation becomes insolvent, equity will compel the holders of bonus stock, or stock not in fact paid in full, to make the representation good, by paying the balance due on their stock to the extent necessary to pay creditors whose debts were contracted subsequent to the issuing of the stock as fully paid, and who are presumed to have relied on the representation. It is the misrepresentation of fact in stating the amount of capital to be greater than it is in fact which is the basis of the liability of the stockholders in such cases. A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets

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of the corporation have been increased to the amount of the par value of the stock so issued.

The very basis of this action clearly indicates that the alleged liability sought to be enforced in this action was not within the contemplation of the parties at the time the bond agreement was made, and that it was not waived thereby. How can the plaintiff be said to have waived a liability, when he had no knowledge of the facts out of which the alleged fraud and consequent liability sprung? Is it reasonable to assume that the company or its stockholders intended by the agreement to guard against liability for fraud which from their viewpoint never existed and was not then claimed by any one? We hold that the agreement here in question does not constitute a waiver by the plaintiff of the alleged liability sought to be enforced by this action, nor a defense thereto.

It was alleged in the second defense, and admitted by the demurrer, that no representations were ever made to the plaintiff that the shares of stock were fully paid, except the fact that they were issued as fully paid; that he made no inquiries either as to the amount thereof, or the amount paid thereon; and that he had no information in regard thereto. It is urged, in effect, on behalf of the defendant, that in view of this admission the plaintiff did not rely on any representation that the stock was fully paid. We cannot concur in this view of the effect of the allegations referred to. The complaint expressly alleged that the plaintiff, relying upon the representation that the shares had been paid in full, purchased and paid for his bonds. This allegation is put in issue by the general denial contained in the first defense. The allegation in the second defense relied on is simply a statement of evidentiary facts relevant to the issue whether the plaintiff did in fact rely upon the representations as alleged in the complaint. It does not appear upon the face of the second defense that the plaintiff did not rely upon the representation.

With reference to a trial of this issue we deem it proper to say that the presumption of reliance by creditors upon the representation that stock issued as fully paid is so in fact is only prima facie. The rule in such cases is that: "It is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed

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amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus stock.'" Hospes v. Northwestern M. & C. Co., 48 Minn. 174, 50 N. W. 1117, 15 L.R.A. 470, 31 Am. St. 637.

It follows that the demurrer to the defense should have been sustained.

Order reversed.

JAGGARD, J., took no part.

IRVING CRETEAU v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.[1]

February 10, 1911.

Nos. 16,862—(227).

Liability under federal or Wisconsin statute — charge to jury.

An action for personal injuries, predicated wholly and entirely upon the statutes of the state of Wisconsin abolishing the fellow servant doctrine as respects railroad employment, and tried throughout upon the theory of liability thereunder, *held* erroneously submitted to the jury upon the question whether defendant was liable under the federal employer's liability act.

Action in the district court for Ramsey county, based upon the Wisconsin act of 1907, c. 254, to recover $25,000 for personal injuries sustained while employed as a mechanic in defendant's shop at Milwaukee. The defenses set up in the answer are stated in the opinion. The reply was a general denial. The case was tried before Orr, J., who, at the close of the trial, denied defendant's motion for a directed verdict upon the grounds, among others, that the Wisconsin statute was unconstitutional and had been superseded

[1]Reported in 129 N. W. 855.

[Note] Fellow servant rule as affected by statute, see note in 12 L.R.A.(N.S.) 1040.

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by the federal statute, 35 St. 65, c. 149, and submitted the case to the jury under the federal employer's liability act. The jury returned a verdict in favor of plaintiff for $12,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed and new trial granted.

Brown, Abbott & Somsen, for appellant.

Barton & Kay, for respondent.

BROWN, J.

Action to recover for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff had a verdict, and defendant appealed from an order denying its motion for judgment notwithstanding the verdict or a new trial.

Plaintiff was in the employ of defendant in the capacity of machinist at the city of Milwaukee, in the state of Wisconsin. He there received the injury to recover compensation for which this action was brought. The action, by the allegations of the complaint, was predicated upon chapter 254, Laws Wis. 1907, and that statute was pleaded and therein set out in full. That statute in substance abolishes the fellow servant doctrine, as respects railroad employment, but provides that it shall not apply to "employees working in shops or offices." The defense was (1) that plaintiff was a shop employee, and therefore not within the provisions of the statute; and (2) that his injury was occasioned by his own contributory negligence, and that he assumed the risks. The issues thus presented were litigated on the trial. Plaintiff offered in evidence the Wisconsin statute, and evidence tending to support and establish the other allegations of the complaint, and defendant offered evidence in support of its defense.

At the conclusion of the trial defendant moved for a directed verdict upon several grounds, among others, that the statute of Wisconsin, made the basis of the action, was unconstitutional and void, and had been superseded by the act of congress known as the "Federal Employer's Liability Act." [35 St. 65, c. 149.] The motion was discussed by counsel at length, and the trial court ruled, in harmony with defendant's contention, that the Wisconsin statute,

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having been enacted prior to the act of congress, was superseded by the latter, and consequently that plaintiff could not recover under that statute. The court further ruled, however, that the case should go to the jury upon the question whether defendant was liable, on the facts disclosed, under the act of congress. The case was sent to the jury accordingly, and a verdict returned for plaintiff. Defendant duly excepted. This ruling is assigned as error and presents the controlling question on this appeal.

1. It is clear that the learned trial court erred in disposing of the case in the manner stated. Counsel for plaintiff does not seriously contend to the contrary. The action, by the allegations of the complaint, was founded entirely upon the Wisconsin statute, and the trial proceeded throughout upon the theory of liability or nonliability thereunder. The action of the court in submitting the case to the jury under the act of congress was a clear departure from the issues presented and the course of the trial, and unauthorized. Elston v. Fieldman, 57 Minn. 70, 58 N. W. 830; Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468.

There must be a reversal, therefore, unless the contention of plaintiff, that defendant is estopped from raising the question, and that in any event the manner of the submission of the case was without prejudice, be sustained. Plaintiff's contention in this respect is that by urging in support of an objection to the introduction in evidence of the Wisconsin statute, and again in support of the motion for a directed verdict, that the state law had been superseded by the act of congress, thus inducing the court to so hold, defendant is estopped from raising the point that the case was improperly submitted to the jury, and, again, that no prejudice resulted from the action of the court.

Neither of these claims can be sustained. The conduct of counsel on the trial in arguing to the court that the Wisconsin statute had been superseded by the act of congress cannot, in the face of his objection and exception, be held a consent to try the case upon issues not presented by the pleadings, and there was no waiver of the right to insist that the trial be confined to those issues. It might with equal force be contended that in an action to recover upon an

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open account, in which on the trial defendant established the fact that he had given a negotiable promissory note for the amount of the account, and counsel urged that fact on a motion for a directed verdict, plaintiff might recover upon the note. There was, therefore, no waiver or estoppel.

Nor can it well be said that there was no prejudice to the rights of defendant. We would not be justified by the record in saying that the course of the trial, and the evidence adduced, would have been the same, had the act of congress been made the basis of the action. The Wisconsin statute and the act of congress are essentially different in some substantial respects. The one refers to injury to employees in the railroad service in Wisconsin; the other to railroad employees engaged in interstate commerce. Under the federal act contributory negligence is not a defense, but serves only in reduction of damages, while it constitutes a defense under the Wisconsin statutes if greater than the negligence of defendant. The course of the trial of an action predicated upon either would naturally vary and materially differ, and we are not prepared to hold that a shifting from one to the other at the close of the trial is a mere informality.

2. The question discussed at some length by counsel for plaintiff, namely, the validity of the Wisconsin statute, and whether it has been superseded by the act of congress, as respects railroads engaged in an interstate business, is not properly before the court. The question is not presented by any assignment of error and was not discussed by counsel for defendant, and he was not required to do so. It is not, therefore, considered.

Order reversed and new trial granted.

JAGGARD, J., took no part.

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S. OMINSKY v. CHARLES WEINHAGEN & COMPANY.[1]

February 10, 1911.

Nos. 16,882—(219).

Verdict sustained by evidence.

In this a personal injury action the verdict of the jury, involving a finding that fright and nervous shock, resulting from an accident, caused the particular ailment for which damages were awarded, is sustained by the evidence.

Action in the district court for Ramsey county by the father of Tillie Ominsky, a minor, to recover for her benefit $25,000 for personal injuries sustained by her. The complaint alleged that defendant, in violation of the statute, employed plaintiff minor in its factory, and her duties required her to go about dangerous machines to remove paper boxes. Plaintiff minor, as she had been instructed to do, went to the rear of a dangerous and unguarded machine, which was then idle, and while in the act of removing boxes from a point in close proximity to the machine, defendant, well knowing her perilous position and wholly disregarding its duty in that respect, wrongfully caused the machine to be started without any warning to her, and by reason thereof some portion of her clothing was caught in the unguarded portion of the machine, and her body was drawn up to and against the machine, whereby she sustained a severe shock to her nervous system. The answer alleged contributory negligence on the part of the minor. The case was tried before Orr, J., and a jury which returned a verdict in favor of plaintiff for $2,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

How, Butler & Mitchell, for appellant.

McElwee & Hollihan, for respondent.

[1]Reported in 129 N. W. 845.

[Note] Right to recover for physical injury resulting from fright caused by a wrongful act, see note in 3 L.R.A.(N.S.) 49; and note in 22 L.R.A.(N.S.) 1073.

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SIMPSON, J.

While working for defendant, Tillie Ominsky, then fourteen years of age, had her dress caught in a machine near which she was standing, and was drawn towards the machine, and a lever attachment struck her in the face with sufficient force to cause a slight abrasion. She was badly frightened by the accident. She went home, and was nervous and hysterical for several days, and at intervals thereafter for several weeks. About ten days after the accident her hair, which had previously been abundant and in good condition, began to fall out very rapidly, and within three weeks after the accident her body was devoid of hair, and remained substantially in that condition up to the time of trial, a period of upwards of four years.

This action was brought by the father of Tillie Ominsky to recover from the defendant damages for the injury resulting to her from the accident above described; it being claimed that the accident was caused by defendant's negligence. On the trial plaintiff recovered a substantial verdict, which cannot be supported unless the loss of hair suffered by the girl was shown to be attributable to the described accident. Whether the evidence sufficiently established that fact is the single question raised in this court, on the appeal of the defendant from the order denying its alternative motions for judgment or a new trial.

The medical testimony on the trial was to the effect that alopecia areata universalis, or general baldness, the condition of this girl, is a mysterious trouble, the cause of which is not fully understood, and its origin is obscure and conjectural; that medical authorities generally agree, however, that sometimes the trouble has a neuropathic origin, such as nervous shock, fright, or grief, sometimes, and in the larger percentage of cases it is due to parasitic or germ disease, and sometimes it is attributable to heredity. From this evidence, together with the evidence concerning this particular case, the jury were warranted in finding as a fact that fright and nervous shock are an adequate cause for a condition of general baldness. The relation of cause and effect may be established, though the theory of such relationship is not understood. It is a matter of gen-

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eral information that the causes or morbid processes are still unknown in many diseases, and that from our present viewpoint such processes in many other diseases were, until recently, either shrouded in mystery or in error. Yet it does not follow that medical science is unable, with reasonable certainty, to ascribe the development of such diseases to the existence of certain preceding conditions or injuries.

The testimony in this case was that by a general consensus of opinion of medical authorities it was recognized and established that this trouble did have its origin in fright and nervous shock. A court cannot assume, either that this conclusion is not well founded, because the morbid processes involved are not understood, or that this conclusion of medical experts is based on insufficient data, because the experience and observation of laymen do not furnish sufficient data to establish such conclusion.

It also appeared from the testimony that it was impossible to determine in a particular case of general baldness, by a physical examination, what caused the condition, and that therefore the cause in each case could only be determined, if at all, by the history of the case. Upon the question of the cause of the trouble in the case of this girl, each of the experts called by plaintiff gave it as his opinion that in view of the history of the case, as above given, the condition of baldness was caused by the fright and nervous shock incident to her said accident, and the experts called by the defendant stated that it was possible that it was so caused. The evidence did not show the existence of any other circumstance or condition in her case that is recognized as a cause of this disease. By the evidence, then, an adequate cause resulting from defendant's negligence for the condition of baldness was shown to be present in the case of this girl, and there was no evidence of the presence of any other adequate cause for the condition.

Clearly this took the question of the cause of the baldness of this girl out of the realm of conjecture, and the jury were warranted in finding that the present adequate cause in fact produced the condition. The plaintiff, to make a prima facie case, is not bound, in addition to establishing that the negligent act is an adequate proximate cause of the injury, to negative the existence of any other ade-

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quate cause. On this point the present case is distinguishable from the cases in which it has been held that, two adequate causes being present, one cannot arbitrarily or as a matter of conjecture be found to be the responsible cause. The jury were warranted by the evidence in finding that fright and nervous shock are an adequate cause of the condition of general baldness, and that this condition in Tillie Ominsky was produced by the fright and nervous shock from the accident occasioned through defendant's negligence.

Affirmed.

JAGGARD, J., being absent, took no part.

ANDREW THOMPSON v. ST. LOUIS RIVER DAM & IMPROVEMENT COMPANY.[1]

February 10, 1911.

Nos. 16,888—(233).

Negligence in operation of dam — change of venue — evidence.

Action by a homesteader in possession of his claim to recover damages for loss of his crops thereon, alleged to have been caused by the negligence of the defendant in maintaining, operating, and supervising its dam in the river, whereby its waters were cast upon the land in destructive quantities. Verdict for plaintiff. *Held*, that the trial court did not err in denying defendant's motion for a change of place of trial, nor in its rulings as to the admission of evidence, nor in its charge, and, further, that the verdict is sustained by the evidence.

Action in the district court for St. Louis county to recover $200 for the destruction of certain crops and for injury to plaintiff's clearing by the deposit of brush, logs and accumulations of various descriptions, which it became necessary to remove to prepare the

[1]Reported in 129 N. W. 780.

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land for subsequent cropping and use. The answer alleged, among other matters, that if any part of the land described was at the time therein set out submerged or overflowed to any extent, the same resulted solely from unusual, extraordinary and unprecedented rains which caused the St. Louis river and all the streams in that region to overflow their banks, and that the rains and freshets could not have been anticipated or averted. The reply was a general denial. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for $151.75, and answered a special question to the effect that the east gate in defendant's dam became closed by reason of the appliances by which the gate was kept open having become defective and out of repair. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

William B. Phelps, for appellant.

Arnold & Pickering, for respondent.

START, C. J.

The plaintiff settled upon, improved, and was, at all times here material, in possession of the land described in the complaint, the fee title to which was in the United States, and upon which he had growing crops. The defendant owned and maintained a dam in the St. Louis river, in the vicinity of plaintiff's claim, for the purpose of facilitating the driving of logs in the stream. This action was brought in the district court of the county of St. Louis to recover damages to the crops of the plaintiff, which the complaint alleged were caused by the negligence of the defendant in maintaining and operating its dam, and in negligently failing to properly care for and supervise the same, whereby the water of the river was diverted from its natural course and thrown in destructive quantities upon the land so occupied by the plaintiff. The answer put in issue the allegations of the complaint as to the plaintiff's possession, the defendant's negligence, and resulting damages. There was a verdict for the plaintiff for $151.75. The defendant appealed from an order denying its motion for a new trial.

The first contention of the defendant is that the trial court erred

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in denying its motion, made after the jury were impaneled and before any evidence was received, to change the place of trial from Virginia to Duluth, for the reason that a trial involved the title to real property. The motion was based on Laws 1909, p. 115, c. 126, § 1, providing for the holding of general terms of the district court at Virginia, but that all actions involving the title to real estate should be tried at Duluth. Waiving the question whether the motion could properly be made at the time it was made, we are of the opinion that its denial was not reversible error, for the action was not one necessarily involving the title to real estate on the face of the pleadings, for its gist is an injury to the possession only. Again, the undisputed evidence, which was received without objection, shows that the plaintiff was at the time of the trial, and had been for three years, in the actual possession of the land, which belonged to the United States, under a homestead filing and settlement thereon, and that he had made improvements thereon of the value of at least $1,500. The trial involved no controversy as to the title to real estate, and in no event could the ruling be held to be reversible error.

On the trial the plaintiff testified to the effect that about one acre of the land, upon which he had turnips growing, was submerged by the water, and the crop destroyed, and that the water when it subsided left "limbs, bark, and stuff" thereon. He also testified, over the objection and exception of the defendant, as to the time and labor expended in clearing the land of the débris that was brought thereon by the water, in order to get ready for the next year's crops. The reception of this evidence is urged as error, as an attempt to show injury to the land itself; that is, as we understand counsel, to the freehold. The fair import of the record is that the evidence tended to show an injury only to the plaintiff's possession. The court did not err in receiving the evidence, nor in permitting the plaintiff to show the damage by the water to his growing crop of timothy and clover.

The defendant also urges that the verdict is not sustained by the evidence. We are of the opinion that the evidence is sufficient to support a finding that the defendant's alleged negligence was the

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cause of the overflow of the land and to sustain the verdict. This brings us to a consideration of the most serious question presented by the record. Did the court commit reversible error in its instructions to the jury, or in its refusal to give instructions requested by the defendant?

Eleven separate alleged errors are assigned in this connection. It is quite clear from the record that the court did not err in refusing the requested instructions, for they either failed to state accurately the law applicable to the case made by the evidence or were substantially covered by the general charge. The errors claimed in the charge of the court as given are to the effect that it left the jury to find for the plaintiff without proof of negligence on its part; that is, that it was an insurer of the dam against all injuries that might result therefrom. There was evidence tending to show that the appliances, whereby the gates in the dam, when raised, were kept in position, were defective and out of repair; that the east gate was so insecurely fastened by the defendant's agent that it dropped and closed, whereby the water in the river backed up and submerged the land occupied by the plaintiff, and caused the injuries complained of.

The trial court instructed the jury that if they found such to have been the case the defendant was liable, and concluded this part of the charge with these words: "This would be true, regardless of whether the defendant was negligent in the manner of maintaining or operating its dam." This was followed by the instruction: "If you find that the east gate of the defendant's dam was lowered or closed by some person without authority from or acting for the defendant (in which case he would be a mere trespasser), and you further find that the defendant in the exercise of ordinary care knew, or ought to have known, that the gate was closed prior to the injury to the plaintiff's crops, and should have raised or opened the same prior to the injury to the plaintiff's crops by overflowing the land, then the defendant is liable. * * * The burden of proving that the east gate was closed by reason of the defective condition or want of repair of the apparatus by which it was held open is upon the plaintiff, and the burden of proving that

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the defendant was negligent and that its negligence was the proximate cause of the injury to the plaintiff's crops, is also upon the plaintiff. Both of these propositions the plaintiff must prove by a fair preponderance of the evidence."

It would seem that the court had in mind a distinction between operating or maintaining the dam, and permitting the appliances, which held the gates in position when raised, to become defective, and in insecurely fastening the gates. However this may be, we are of the opinion that the charge, considered as a whole, contains no reversible error. No exceptions were taken to the charge until a motion for a new trial was made.

Order affirmed.

JAGGARD, J., took no part.

PAUL HANSMANN v. P. J. POLLARD.[1]

February 10, 1911.

Nos. 16,917—(172).

Sale — breach of warranty — evidence.

The defendant gave a written order for a steering pole to be attached to a threshing separator for the purpose of steering and drawing it. The order contained express warranties, but provided that a failure to give a note for the purchase price of the pole before it was delivered should discharge the plaintiff from all warranties. The pole was delivered, but the note was neither given nor demanded by the plaintiff before delivery. *Held* that, in an action for the purchase price of the pole, the defendant was entitled to show a breach of the warranty implied by law that it was fit for the purpose intended.

Action begun in justice court, where plaintiff obtained a judgment in his favor. Defendant appealed to the district court for

[1]Reported in 129 N. W. 848.

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Todd county, where the case was tried before Taylor, J., who directed a verdict in favor of plaintiff, From the judgment entered pursuant to the verdict, defendant appealed. Reversed, and new trial granted.

J. D. Jones, for appellant.

Peterson & Church, for respondent.

START, C. J.

This action originated in justice court. The complaint alleged that on August 1, 1906, the plaintiff sold and delivered to the defendant one Hansmann steering pole for the agreed price of $35, payable the first of October following. The answer, with other matters, alleged a warranty and breach thereof, to the effect following: The plaintiff agreed to sell and deliver to defendant one Hansmann separator steering device complete, to be attached to a separator. Such device was sold by said plaintiff and bought by defendant for the sole purpose of being used in steering his separator, and the plaintiff warranted such steering device to be made of good material, to be constructed in a workmanlike manner, to perform the work required of it, and that it would work when moving forward or backward with separator, and was durable, with proper care. It was not made of good material, nor constructed in a workmanlike manner, and it did not and could not perform the work required of it. It would not work when moving forward or backward with separator, was not durable with proper care, and was wholly worthless. The defendant appealed from the judgment of the justice in favor of the plaintiff to the district court of the county of Todd. A trial in that court resulted in a judgment for the plaintiff for the amount claimed, entered upon a verdict directed by the court. This is an appeal by the defendant from the judgment.

The assignments of error raise the question whether the trial court erred in rejecting the defendant's offer to show that the steering pole was worthless and of no value for the purpose for which it was sold or for any other purpose, and that he returned it to the plaintiff and notified him of its defective condition and worthlessness for the purposes for which it was sold. This ruling was based upon the written

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order of the defendant, dated June 21, 1906, which, so far as here material, was to the effect following:

To Hansmann Manufacturing Company, Long Prairie, Minn.: Ship to me as Osakis, Minn., on or about the tenth day of August, 1906, one Hansmann separator steering device, complete, to be attached to a separator with axle fifty-six inches between wheels having coupling forty-four inches apart, coupling to be side plate plates. I hereby agree to receive the above-described machinery on arrival, subject to the conditions and warranties herein, and agree to pay before delivery of machine $35.00, by note for $35.00 due October 1, 1906, and, failing to pay the money or to execute and deliver the note, this order shall stand as the purchaser's written obligation, and have the same force and effect as a note for all sums not paid in cash, and discharge the company from all warranties.

The above separator steering device is warranted to be made of good material, to be constructed in a workmanlike manner, and will perform the work required of it; that it will work when moving forward or backwards with separator; that it is durable, with proper care.

It is clear from the evidence that the pole was intended to be attached to a threshing separator for the purpose of steering and drawing it, and that it was ordered for this use or purpose. The pole was shipped and delivered, on the order, to the defendant. He did not give the note before delivery, or at any time, nor did the plaintiff ever ask him for the note. The defendant had no opportunity to examine the pole before delivery.

The contention of the plaintiff, and such seems to have been the view of the trial court, is to the effect that, because the defendant did not give his note before the delivery of the pole, the warranties in the order were thereby discharged, and, there having been an express warranty in the contract, there can be no implied contract that the pole was reasonably adapted for the purpose and use for which it was intended and ordered. The cases of Warren v. Watson, 92 Iowa, 759, 60 N. W. 481, and Robinson v. Berkey, 100 Iowa, 136, 69 N. W. 434, 62 Am. St. 549, are cited in support of this proposition. These cases support the contention of the plaintiff to the extent only

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that the failure to give the note before delivery of the pole was a waiver of the express warranties contained in the order; but they do not sustain the further contention that the defendant cannot avail himself of the implied warranty that the pole was reasonably fit for the purpose for which it was ordered and intended.

The contention of the defendant is that, having failed to give the note before delivery, the express condition upon which the warranties in the written order were made to depend, the case stands precisely as if there were no warranties, conditional or otherwise, expressed in the order, and, the pole having been intended and ordered for a particular use or purpose, there was an implied warranty that the pole was reasonably adapted to such use or purpose. A determination of the respective contentions of the parties involves a construction of the written order or contract.

A warranty of a chattel is a matter of contract, expressed or implied, and the seller may attach such conditions or limitations to the express warranty as he may see fit. An express warranty will exclude an implied one on the same subject. Where a chattel is intended and ordered for a particular use or purpose, the general rule is that there is an implied warranty that it shall be fit for the purpose intended. Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359.

It appears incidentally from the record that the order, as to its conditions and warranties, was printed matter selected and prepared by the plaintiff. Again, it is an unfair one, so far as it provides for a forfeiture of the warranties in case the defendant failed to give his note for the pole before its delivery and before he had an opportunity to examine it. The contract, then, as to the warranties and the conditions upon which they were to be effective, must be construed strictly as against the plaintiff. The provisions of the contract as to the express warranties made therein and the failure of the defendant to give the note before delivery of the pole must be construed together. The warranties discharged by such failure are the express warranties contained in the contract, and, defendant having failed to perform the condition upon which the express warranties depended, and the plaintiff having made delivery without demanding the note, the case stands precisely as if the contract had contained no

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express warranties. Parsons v. Mallinger, 122 Iowa, 703, 98 N. W. 580.

It follows, upon the special facts of this case, that the trial court erred in rejecting the defendant's offer to prove a breach of the warranty, which the law implies, that the chattel ordered is reasonably adapted for the use and purposes intended and for which it was ordered.

Judgment reversed, and a new trial granted.

JAGGARD, J., took no part.

BROWN, J.

I concur in the conclusion, but do not assent to the proposition, if by inference or otherwise the opinion may be construed as so holding, that the contract, in so far as it provides that the failure of the purchaser to pay for the machine, or give his promissory note therefor, before delivery thereof, discharges the warranty, is valid or enforceable. It might well be claimed that the contract in this respect imposes as a penalty for the failure of the purchaser to pay for the machine before delivery, or even an opportunity for inspection of the same, the forfeiture of a substantial and valuable right, namely, the right to apply to the courts for redress for a breach of the warranty, and therefore obnoxious and unenforceable.

W. C. FOSTER v. JAMES A. COUGHRAN and Others.[1]

February 10, 1911.

Nos. 16,918—(241).

Opening judgment — defense by "unknown defendant."

Lack of notice or knowledge of the pendency of the action is sufficient excuse, under section 4160, R. L. 1905, for the failure of an "unknown defendant" to answer therein, and authorizes the court, under said section,

[1]Reported in 129 N. W. 853.

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upon seasonable application, to give such defendant an opportunity to interpose a meritorious defense to the cause of action set out in the complaint.

Same — computation of time — notice from record of decree.

Section 3350, R. L. 1905, providing that "a certified copy of any judgment, decree, or order made by any court of record within the state, affecting title to real estate or any interest therein, may be recorded in any county where any of the lands lie, in the same manner and with like effect as a conveyance," is a recording act, and does not make the record of such judgment notice of the entry thereof, within the meaning of that part of section 4160, R. L. 1905, which limits the time within which applications for relief from judgments may be made to one year from notice thereof.

Action in the district court for Morrison county to determine adverse claims to certain real estate. The facts are stated in the opinion. The case was tried before Taylor, J., who ordered judgment in favor of plaintiff decreeing him to be the owner in fee simple free from all adverse claims. Judgment was entered on May 13, 1909. George W. Stewart gave notice of motion to be made on September 19, 1910, to set aside the judgment as to one tract of land, and to allow him to serve and file his proposed answer on the grounds (1) that he was a resident of the state during the times mentioned, and no summons was served upon him, and (2) inadvertence, surprise and excusable neglect in failing to interpose an answer to the action. The motion was granted. From the order vacating the judgment and permitting said Stewart to make, serve and file his answer to the complaint, plaintiff appealed. Affirmed.

William G. White, for appellant.

Stewart & Brower, for respondent.

Simpson, J.

This action was brought in the district court for Morrison county against a number of named defendants and "unknown defendants" to determine adverse claims to several separate tracts of real estate. Judgment was entered therein May 13, 1909, and the following day a certified copy of the judgment was recorded in the office of the register of deeds for Morrison county. Fifteen months thereafter, George W. Stewart, respondent herein, who was not one of the

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named defendants in the action, moved the said court that the judgment be vacated in so far as it applied to one tract of land, and that he be permitted to defend the action. He based his right to this relief on his claimed ownership of the land involved, and the lack of any knowledge or notice of the pendency of the action, or of the entry of the judgment. The motion was granted, and the plaintiff brings the case to this court by appeal from the order granting such motion.

Respondent's application to be permitted to defend the action, being made more than one year after the entry of judgment, was necessarily made under section 4160 of the Revised Laws of 1905, authorizing the court, in its discretion, to relieve a party from any judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. The action of the court granting relief under this section will not be reversed on appeal, except for a clear abuse of discretion. Perrin v. Oliver, 1 Minn. 176 (202); Dion v. Bassett, 102 Minn. 512, 113 N. W. 1133. The showing made by respondent in his moving papers and proposed answer, in brief, is: That he is the owner of the land in question; that he acquired title through tax sale and unrecorded conveyance from the record owner; that he was not named as a defendant, was not served with summons, and had no knowledge of the pendency of the suit or of the entry of the judgment until shortly before making his motion; and that the plaintiff's claim of ownership is based solely on a void tax title. Clearly, in so far as the motion of respondent was within the discretionary power of the court to grant, no facts appear tending to show an abuse of that discretion.

But appellant contends that no case was made by the facts before the court within the statute for the exercise of judicial discretion. In support of this claim it is urged that no excuse was shown in respondent's moving papers for his failure to seasonably appear and defend in the action. As stated, respondent's affidavit tended to show that he had no notice or knowledge of the pendency of the suit or the entry of the judgment therein until August 6, 1910, shortly before making his motion herein. It would be difficult to suggest a more complete excuse for neglecting to appear in an action than lack of no-

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tice or knowledge of the pendency of the action. This affidavit presents an entirely different situation from that existing in McClure v. Clarke, 94 Minn. 37, 101 N. W. 951, and Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748, in which cases the parties seeking to have the judgment set aside knew of the pendency of the action and without excuse failed to defend. It is immaterial that upon this same showing the respondent, had he applied within a year from the time of the entry of judgment, could have obtained relief as a matter of right under another section of the statute. Such other section does not afford an exclusive remedy in cases that fall also within the provisions of the section here under consideration. Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689. Nor did respondent, in making this application, "stand in the shoes of the record owner," as contended by counsel for appellant. The sufficiency of the assigned grounds for relief must be determined from consideration of the situation of the party seeking the relief.

The showing made in this case by the respondent is that when the action was commenced he was the owner of the land in question, and that the named defendant record owners in the suit had no interest in the land. Personal service on the persons appearing by the record to be owners, but who are in fact not owners, and their default, would not prevent the respondent from asserting his title before judgment, and should not prevent him from obtaining, upon a showing of lack of notice of the pendency of the action, the opportunity to defend, which it is the purpose of the statutes to give, as made evident by the terms of both section 4160 and section 4425.

Where the title is obtained from the record owner after judgment against him, an entirely different case is presented. In such case, ordinarily, the purchaser does stand in the shoes of the record owner, and before he can obtain an opportunity to assert his title in the suit he is bound to excuse, not his default, but the default of the record owner. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. 354. Nor does the right of the respondent to the relief here asked depend upon his asserted title being superior to the title made by

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the judgment of the plaintiff, but it depends upon his having a meritorious defense to the cause of action set out in the complaint. Attributing to plaintiff's judgment the effect he claims for it, that it is binding on the respondent and renders void his claimed title, still that does not determine or affect the right of the respondent, upon a proper application, to have such judgment vacated. Upon such application, a sufficient excuse having been shown for a failure to defend before judgment, it is only necessary for the applicant to show some interest or title superior to the title of the plaintiff prior to judgment. This the respondent does by his proposed answer.

Respondent assigns, as a further reason why this application is not brought within the provisions of section 4160, that it appears that the application was not made within a year of notice of the judgment. A certified copy of the judgment sought to be vacated was filed in the office of the register of deeds of the county in which the land is situated some fifteen months prior to the making of the application. The statute authorizes relief only in cases where the application is made within one year after the notice of the judgment. Therefore, if the filing of the copy of the judgment was notice to respondent, his application made fifteen months thereafter was too late.

Section 3350 of the Revised Laws of 1905 is as follows: "A certified copy of any judgment, decree, or order made by any court of record within the state, affecting title to real estate or any interest therein, may be recorded in any county where any of the lands lie, in the same manner and with like effect as a conveyance."

This section, in terms, gives to the record of the judgment the same effect as is given by the recording acts to the record of a conveyance. It does not purport to, and could not, make the judgment a conveyance or give to a recorded judgment the force of a recorded conveyance. A judgment recorded under this section must, in the absence of anything indicating a different purpose, be given the same effect as notice that is given to the record of instruments generally under the recording acts. A proper record is constructive and absolute notice, charging every person subsequently dealing with

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the property involved, whose duty it is to make examination of the records. A person who has a legal right to rely on the record is chargeable with notice of what the record discloses. The recording acts, by providing that the absence of the record renders a conveyance void as to subsequent purchasers, thereby make the presence of the record notice of the conveyance to the same class. The respondent, as holder of an unrecorded title to land prior to the entry of judgment affecting the land, would not, under the law applicable to recording acts, receive notice of the judgment by its record.

To give the record of the judgment the force of notice within the meaning of section 4160, providing for relief from judgments within a year after notice thereof, would be clearly contrary to the purpose of that section. It is designed to relieve parties, who have a meritorious defense to an action, from the effect of a judgment obtained against them therein, under circumstances which make excusable their failure to assert the defense seasonably. The record of a judgment does not make lack of actual knowledge of the pendency of the suit or entry of the judgment any less excusable. Further, if the record of such judgment is to be deemed actual notice, within the meaning of section 4160, it must likewise be actual notice to one applying for relief from a judgment under section 4113. Under the latter section it has been repeatedly announced that diligence must be used, and that actual notice of the judgment may limit the time within which application must be made to less than a year from the entry of judgment. Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748. If the record of a judgment affecting the title to real estate obtained by default, without personal service upon the defendants, shall be deemed actual notice of the entry of the judgment, it lies in the hand of any person obtaining such judgment to reduce the statutory period of one year allowed such defendants to appear and defend to a small fraction of a year, and that without the defendants ever having actual knowledge or notice of the judgment. There is nothing in the statute providing for recording such judgments that makes such a construction necessary or proper.

In Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108, the effect, as notice, of the statute then in force (chapter 76, Laws 1897), provid-

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ing for the record of the judgments affecting the title to real estate, was discussed, but not decided. That statute was, on this point of notice, essentially different from section 3350, R. L. 1905, in that it provided that, when recorded, the judgment "shall be taken and deemed notice of the contents thereof to all parties interested." Whether that statute should be construed as a recording statute, or as giving actual notice to all parties interested in the land affected by the judgment, was not determined. The present law, in terms, purports to be nothing beyond a recording statute, and, by so construing it, it harmonizes with the other provisions of the law providing for vacating of judgments under certain conditions.

The case presented in the court below was one for relief within the provisions of section 4160, and the court did not abuse its discretion in granting such relief. We have discussed the questions raised by plaintiff's appeal and his objections to the order appealed from. As we conclude that his objections to the order are not valid, it is unnecessary to consider points raised by respondent as to the validity of the judgment herein, or as to its effect on his claimed title, which points were not raised or passed upon in the court below. Under these circumstances, the questions so raised by respondent will not be passed upon in this court. Babcock v. Sanborn, 3 Minn. 86 (141); White v. Western Assurance Co., 52 Minn. 352, 54 N. W. 195.

Order affirmed.

JAGGARD, J., being absent, took no part.

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MARGARET J. WOXLAND v. NORTHWESTERN CONSOLIDATED MILLING COMPANY.[1]

February 10, 1911.

Nos. 16,930—(216).

Questions for the jury — verdict sustained by evidence.

In an action to recover for the death of plaintiff's intestate, caused by the alleged negligence of defendant in setting in motion and operating dangerous machinery without first covering or guarding exposed parts thereof, by reason of which decedent, an employee of defendant, was injured, and from which injuries he subsequently died, it is *held* that the questions of negligence, contributory negligence, and assumption of risk were properly submitted to the jury, and that the evidence sustains the verdict.

Negligence of fellow servants.

The question whether decedent's death was caused by the negligence of fellow servants was not presented by the evidence, and the court did not err in denying defendant's request to submit it to the jury.

Damages not excessive.

Damages awarded by the jury *held* not excessive.

Action in the district court for Hennepin county by the administratrix of the estate of Ole O. Woxland, deceased, to recover $5,000 for the death of her intestate. The facts are stated in the opinion. The answer was a general denial. The case was tried before Simpson, J., and a jury which returned a verdict in favor of plaintiff for $4,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Brown, Albert & Guesmer, for appellant.

James Manahan and *C. M. Bracelen,* for respondent.

[1]Reported in 129 N. W. 856.

[Note] Injury from projecting screws in moving machinery, see note in 48 L.R.A. 96.

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BROWN, J.

Action to recover for the death of plaintiff's intestate, caused, as alleged in the complaint, by the negligence of defendant. Plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

Defendant owns and operates a large flour mill in the city of Minneapolis, adjacent to which is located an elevator for the storage of grain. Both are equipped with the machinery usual and necessary to the proper operation thereof. In the basement of the elevator is located a conveyor; that is, a box made of planks and boards, eighteen inches in diameter, in which runs a large spiral or screw, by means of which grain is moved along the conveyor to elevating shafts and thus transferred from bin to bin and to the mill. The conveyor sides and bottom are of two-inch planking, the top or cover of inch boards, and it is elevated from the floor about eight feet, being held in position by supports from the ceiling. For two or three weeks prior to the death of plaintiff's intestate defendant had been engaged in overhauling and repairing its mill, and particularly the machinery located in the basement of the elevator. The conveyor box had been removed to a new position, and the covering, or parts thereof, had been taken off and not returned, though the box had been installed in its new location.

Decedent was in the employ of defendant as an oiler and watchman. His duties were to oil gearings and different parts of the machinery in the basement. Parts of the machinery requiring this service were located above, and other parts in close proximity to, the conveyor. Running boards were placed on a level with the conveyor, upon and by means of which the oilers went from place to place, reaching the running boards by means of ladders provided for that purpose. The running boards were not, however, designed exclusively for this purpose, but were in fact used by the oilers in their work. The repairs in this department had not been completed on the day decedent was injured, yet defendant's manager or foreman directed the machinery set in motion for the purpose of moving certain grain. After the machinery had been started,

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decedent in the discharge of his duties set about oiling the different parts. He applied oil to a gearing near one end of the conveyor, and then stepped upon that appliance for the purpose of passing thereon to the opposite side of the basement to oil parts of the machinery there located. As he was walking along upon the conveyor, he stepped into the uncovered part thereof. His foot was caught by the revolving screw, inflicting injuries from which he subsequently died.

Plaintiff thereafter brought this action to recover for his death, charging, in her complaint, that the injury and death were caused by the negligence of defendant in starting the machinery in motion with this dangerous instrumentality uncovered and exposed, without informing decedent of its condition. The complaint also alleged that the basement where the machinery was located was dimly lighted, and that decedent was unable by the exercise of ordinary care to discover the fact that it was uncovered. The effect of this allegation is to negative contributory negligence on the part of decedent, and it is not claimed as one of the proximate causes of his death.

The case was submitted to the jury upon the theory of the complaint. The court instructed the jury in effect that the screw within the conveyor box, revolving with considerable rapidity, was a dangerous machine within the meaning of our statutes requiring such machinery, when practicable, to be covered or guarded, but submitted to the jury the question whether it was so located as to be likely to expose employees to injury by coming in contact with it. The court also submitted to the jury the question whether decedent rightfully made use of the conveyor as a means of passing between different parts of the machinery which he was required to oil, saying that if he was rightfully upon the conveyor on the occasion in question, and the conveyor was so located that it should, under the statute, have been covered, plaintiff was entitled to recover, unless decedent assumed the risks or was guilty of contributory negligence.

It is contended on this appeal: (1) That the trial court erred in refusing to direct a verdict for defendant, on the ground that the evidence wholly fails to establish negligence on the part of defend-

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ant, and that decedent's assumption of risk and contributory negligence conclusively appear; and (2) that the court erred in denying the motion for a new trial because of errors occurring on the trial, and excessive damages appearing to have been given under the influence of passion and prejudice.

1. There can be no question but that the revolving screw in the conveyor box, a large steel appliance for transferring and moving grain from one part of the elevator to another, and moved by a powerful agency, is a dangerous piece of machinery, within the meaning of our statutes, and, if located where workmen are likely to come in contact with it in the discharge of their duties, should be guarded and protected as required by law. Nor can there be any serious question that its position in the elevator did in fact, if uncovered, expose employees to the danger of injury therefrom. While it was elevated eight feet above the floor, employees, particularly those charged with the duty of oiling the machinery, had frequent occasion to come in close proximity with it in the performance of their work, and their protection from injury, by stepping or falling into the conveyor through accident or inadvertence, required that it be covered, there being no contention that it was impracticable to do so. At any rate the evidence fully sustains the action of the trial court in submitting this feature of the case to the jury. The evidence is conclusive that it was not completely covered at the time in question. At one end thereof, and near a point where decedent was required to oil certain bearings of the machinery, part of the covering had not been replaced by those making the repairs in this department, leaving a hole sufficiently large to admit a person's foot, into which decedent stepped. The duty to guard and protect machinery of this kind is an absolute one, and is not discharged by the exercise of reasonable care. Glockner v. Hardwood Mnfg. Co., 109 Minn. 30, 122 N. W. 465, 123 N. W. 807. Nor is a partial compliance with the statute sufficient to discharge the obligations thereby created. And as it appears without question that the machinery in this department of the mill was set in motion without first complying with the law by covering the conveyor, defendant was properly found guilty of negligence, and

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plaintiff may recover, unless decedent, in making use of the conveyor box as a passageway, assumed the risks incident to its uncovered condition, or was guilty of contributory negligence. 2 Dunnell, Digest, § 5895.

2. A careful examination of the record leads to the conclusion that the questions of assumption of risk and contributory negligence were properly submitted to the jury and that the evidence sustains their verdict. We find no evidence from which it may be said, as a matter of law, that decedent was guilty of negligence contributing to his death.

In passing over the conveyor box we are bound to presume, since he is dead, that he exercised reasonable care, and that his act in stepping into the hole in the covering thereof was not because of inattention or carelessness. We find no evidence to the contrary, at least not of a character to resolve the question into one of law. 2 Dunnell, Digest, § 7032. Whether decedent assumed the risks incident to the use of the conveyor as a passageway depends upon the further question whether he rightfully, by custom, or express or implied permission, so used it. There is no evidence that decedent knew the conveyor was uncovered at the time he attempted to pass over it, and whether the fact was so apparent and plainly observable to one in the exercise of reasonable care as to charge him with notice was on the evidence a question of fact. It cannot, therefore, be said as a matter of law, if he had a right upon the conveyor, that he assumed the risk incident to its uncovered condition. The turning point on this branch of the case is whether decedent rightfully made use of the conveyor as a passageway between points for oiling the machinery. It was not constructed or designed for that purpose, but was, by reason of its location and position, a convenient way of passing from one bearing to another. It was eighteen inches wide, on a level with the runway boards or planks extending on either side, at right angles, making a suitable and convenient passageway. The conveyor had always been kept covered, except during the repairs being made just preceding the accident, and the evidence tends to show that it had been used by other oilers in the performance of their work. It was naturally adapted to such use, and we find no

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evidence that walking thereon was necessarily dangerous, or that it had been forbidden by defendant; at least no evidence sufficient to require the jury to so find. And our conclusion is that it was on the evidence a fair question of fact whether in walking upon the conveyor decedent was at a place not necessary or proper in the discharge of his duties, or whether in view of the situation defendant was not bound to anticipate that it would or might be used by oilers and others for this purpose.

It is well settled that the obligations of the master to provide his servants with a reasonably safe place extends to the portion of the premises on which they are required to do their work and such other places thereon and conveniences incident thereto as they are expressly or impliedly invited or permitted to use. Thomas v. Wisconsin Cent. Ry. Co., 108 Minn. 485, 122 N. W. 456, 23 L.R.A.(N.S.) 954; Taylor v. Bush, 6 Pennewill (Del.) 306, 66 Atl. 884, 12 L.R.A. (N.S.) 853. And as the conveyor was not only convenient and facilitated in discharge of the duties of decedent, but was frequently used for the purpose of passing from place to place, without objection from defendant, it cannot be said as a matter of law that decedent forfeited his right of protection by making use thereof on the occasion of his injury. The question was for the jury.

3. There was no error in the refusal of the trial court to submit to the jury the question whether the accident to decedent was caused by the negligence of fellow servants. The court properly ruled that the fellow servant doctrine had no application to the facts. This department of defendant's mill had been undergoing repairs, a work ordered and directed by defendant. The conveyor box had been moved to a new location, and the cover thereof had not been replaced when the machinery was set into operation. While the work of repairing the mill was performed by fellow servants, defendant failed in the performance of its statutory duty in not re-covering the conveyor, and thus protecting and guarding the dangerous machine contained therein from contact by servants employed in its vicinity, and the act of the superintendent in starting the machinery with the conveyor partly uncovered was the act of defendant, and not that of a fellow servant of decedent. Defendant was bound to know, be-

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fore starting the machinery in motion, that it was in suitable and proper condition for operation, and that all its statutory and other absolute duties to its servants had been complied with. Davidson v. Flour City O. I. Works, 107 Minn. 17, 119 N. W. 483, 28 L.R.A. (N.S.) 332, 131 Am. St. 433. A failure in this respect affirmatively appears from the omission to cover the conveyor. It was, therefore, the neglect of defendant, and not that of a fellow servant.

4. Counsel for defendant at the close of the trial presented a large number of special requests for instructions to the jury, which were all refused, except as given in the general charge. The court properly followed the practice commended in Davidson v. St. Paul, M. & M. Ry. Co., 34 Minn. 51, 24 N. W. 324. The questions in issue were carefully covered by the court, and the special requests, so far as pertinent, were sufficiently included in what was said to the jury. We discover from the record no ground for the suggestion that counsel were not informed of the theory upon which the case would be given to the jury. The theory of the case was that outlined by the complaint, and there was no departure therefrom on the trial.

Nor was the court in error in refusing to admonish the jury that an indemnity insurance company is entitled to the same consideration in courts of justice that is accorded to individuals. While it is entirely proper in any case to remind the jury of their solemn duty, and to urge them to give even and impartial consideration to the evidence and determine the issues fairly, it is not absolutely necessary to specially refer to the character of one of the parties, or one interested in the action, for the purpose of removing from the jury a possible prejudice. Presumptively there is no such prejudice; but if it exists in any particular case, and is acted upon by the jury, the trial court will administer the proper relief for such misconduct. There is nothing in the record before us indicating a necessity or propriety of a special admonition of this kind.

5. Decedent left surviving him a wife, but no children. He was thirty-eight years of age; plaintiff, his wife, thirty-two. He was strong and healthy, and provided comfortably for himself and also his wife, whose health is somewhat impaired. The jury awarded $4,500. The claim that the amount is excessive is not sustained.

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Nor did the court commit reversible error in charging the jury upon this branch of the case.

This covers all questions requiring special mention, and results in an affirmance of the order appealed from.

Order affirmed.

SIMPSON, J., having heard the case below, took no part, and JAGGARD, J., absent, took no part.

JOHN W. NORTON v. JAMES F. SPERRY.[1]

February 10, 1911.

Nos. 16,938—(243).

Dissolution of partnership — appointment of receiver.

In an action for the dissolution of a copartnership and for the appointment of a receiver to wind up the firm affairs, the only questions necessary to be determined preceding the appointment of a receiver are: (1) The existence of the alleged copartnership; and (2) the facts necessary to vest in the court jurisdiction of the controversy.

Same.

The appointment of a receiver in such an action in no way determines the rights of the partners, but is merely preliminary to a full hearing and adjustment of all differences, upon which the partners may be heard in the due course of subsequent proceedings.

Action in the district court for Ramsey county to dissolve a partnership, and for an accounting and the appointment of a receiver. The complaint alleged, among other matters, that for convenience title to part of the real estate acquired was taken in the name of defendant; that defendant served a notice upon plaintiff on August

[1]Reported in 129 N. W. 843.

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9, 1909, declaring the partnership entered into in October, 1905, dissolved, and demanding an accounting and distribution of the assets; that immediately upon giving such notice defendant took sole charge of the business and refused to allow plaintiff to participate therein, and secreted all the books of account; that there had never been a complete accounting between the partners; that they had each drawn out considerable sums of money, but that the amount drawn by defendant greatly exceeded the amount drawn by plaintiff; that a large portion of the real estate acquired by the firm was improved rental property, much of which was incumbered with mortgages, upon which interest had to be paid semiannually, and it was necessary to keep the improvements insured against fire; that plaintiff feared, unless defendant were restrained, he would attempt to dispose of the firm property for his own benefit, and alleged that for a proper preservation of the property it was necessary to appoint a receiver. The answer alleged that on January 22, 1908, a full and complete adjustment of the accounts was made and a division of the assets; denied that defendant was conducting the business, except so far as it had been turned over to his care, and denied that he had attempted to dispose of the firm property.

The case was tried before Kelly, J., who made findings and appointed a referee or receiver by consent of the parties. From an order denying defendant's motion for a new trial, and from an order denying a motion for additional findings, he appealed. Affirmed.

W. R. Duxbury, for appellant.

John D. O'Brien and *Dillon J. O'Brien,* for respondent.

Brown, J.

This action was brought for the dissolution of a copartnership alleged to have theretofore existed between the parties, for an accounting and settlement of the firm transactions, and for the appointment of a receiver to take charge of and wind up its affairs. The cause came on for trial of the issues presented before the court without a jury. The court found that a copartnership existed between the parties as alleged in the complaint, with the facts necessary to vest in the court authority to decree a dissolution thereof and the

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appointment of a receiver to wind up the affairs of the firm. An order was accordingly made appointing a receiver, with directions to take an account of the partnership transactions and report the same, together with such information as would enable the court to close the accounts justly between the parties. Defendant then moved the court for additional findings, and for a modification of those made, and for a new trial. Both motions were denied, and defendant appealed.

The copartnership was formed in October, 1905, and defendant sought by his motion for additional findings to have the court find as a fact that an accounting and settlement was had between the parties on January 22, 1908, of all partnership affairs up to that date. He sought by the proposed modified findings to have determined the fact, claimed by him, that certain transactions in real estate did not concern the copartnership. The motion was properly denied. The subject-matter of the proposed findings was in no way involved in the action at the time of the trial, nor essential to vest the court with jurisdiction to appoint a receiver. The trial of the issues presented was for the purpose of determining (1) the existence of the alleged copartnership and (2) the facts necessary to vest the court with jurisdiction of the controversy. The appointment of a receiver in actions of this kind in no way affects or determines property rights. Smith, Receiverships, 24, 48. It is merely preliminary to a full and final hearing upon the merits of all questions affecting the rights of the partners and the scope and extent of the partnership affairs and the property thereof.

It follows, therefore, that defendant's request for additional findings was properly refused. If a settlement was had between the parties in 1908, as alleged in defendant's answer, it may be presented to the court in connection with the receiver's report, and be heard and determined when final judgment is ordered. The same may be said with reference to the extent and scope of the partnership business, and what transactions it included. The finding of the court that the business of the firm extended to real estate transactions wherever consummated is not conclusive, and will not bar

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the right of defendant to be heard thereon at the proper time. Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.

Order affirmed.

JAGGARD, J., absent, took no part.

ANNA McVEIGH v. MINNEAPOLIS & RAINY RIVER RAILWAY COMPANY.[1]

February 10, 1911.

Nos. 16,948—(232).

Question for the jury — verdict not excessive.

In this a personal injury action, *held*, that there was no error in the submission of the case to the jury, and that the damages awarded are not excessive.

Action in the district court for Itasca county by the administratrix of the estate of John McVeigh, deceased, to recover $5,000 for the death of her intestate. Pursuant to the order of the trial court made on May 10, 1910, after the decision of the former appeal (110 Minn. 184, 124 N. W. 971) defendant served a supplemental answer, in which it alleged that after the trial in August, 1908, plaintiff took possession of all the money paid by defendant to her husband, except the sum of ten dollars, and used and employed the same for her sole benefit; that plaintiff was present at the trial in August, 1908, was fully informed of the purposes for which defendant paid the sum of $1,500 to her husband, and that she had paid out said money for her own use with full knowledge of the facts, by reason whereof she had ratified and confirmed the settlement between defendant and her husband. The case was tried before Wright, J., and a jury which returned a verdict in favor of

[1]Reported in 129 N. W. 852.

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plaintiff for $3,750. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

R. J. Powell, for appellant.

George H. Spear and *Spear & Stone,* for respondent.

SIMPSON, J.

This is an action by an administratrix to recover damages for defendant's negligence in causing the death of John McVeigh. It is brought to this court by defendant's appeal from an order denying a new trial, after a trial in which the plaintiff had a verdict of $3,750. The points here urged by appellant are: First, that the trial judge erred in not submitting to the jury the question as to whether plaintiff, the mother, had authorized or ratified an attempted settlement made by defendant with the father of deceased; second, that the damages are excessive.

1. The legal effect of this attempted settlement was before this court in a former appeal. McVeigh v. Minneapolis & R. R. Ry. Co., 110 Minn. 184, 124 N. W. 971. It was then held that such attempted settlement, if not acquiesced in by the mother, did not bar her right, as administratrix, to bring and recover damages in this suit. Whether she did acquiesce in the settlement remained a question of fact, to be determined on the trial; the burden to establish such fact being on the defendant. An examination of the record fails to disclose any evidence sufficient to sustain a finding that the plaintiff did in any way either authorize or ratify such attempted settlement. The trial judge, therefore, properly refused to submit the question to the jury.

2. No fixed limit, within the statutory one, can be established as applicable in all cases to the damages which may be awarded to the parents in case of the death of a son. The limits fixed in particular cases are based on the facts in those cases. In this case the son was twenty-two, the mother fifty-one, and the father sixty-one years of age. The evidence tended to show that the deceased, a young, sober, industrious man, had visited his mother monthly, and had contributed to her support regularly and to the extent of from $250 to $350 a year; that he had also saved several hundred dollars from his

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wages; that at the time of his decease he was earning upwards of $1,000 a year, with prospects of early promotion. This evidence as to the deceased, his attitude toward his parents, his shown disposition to assist them financially, his present and probable future earning capacity, and his habits of thrift, tended strongly to establish a probability that an unusually large pecuniary benefit would have been received by the plaintiff from her son, had not his power to assist her been cut off through the negligent act complained of. While the verdict is a liberal estimate of the pecuniary loss suffered, it cannot be said that it is not fairly within the limits fixed by this evidence.

Affirmed.

JAGGARD, J., being absent, took no part.

STATE ex rel. GEORGE T. SIMPSON v. VILLAGE OF DOVER and Others.[1]

Nos. 16,764—(42).

February 17, 1911.

Unplatted territory included in village corporation — question of fact.

Whether unplatted territory, included within the limits of a village corporation, is so conditioned as properly to be subject to village government, is a question of fact, to be determined by the voters entitled to vote upon the question; and their decision cannot be disregarded, unless it clearly appears to have been the result of arbitrary action.

Writ discharged.

It does not conclusively appear from the evidence that the unplatted territory of the objectors, incorporated in the village of Dover, was included for the purpose of exacting revenue for village purposes and without regard to its adaptability to village government.

[1]Reported in 130 N. W. 74, 539.

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March 28, 1911.

Attorney general not liable for costs.

Where quo warranto proceedings are instituted by the attorney general, as the representative of the sovereignty of the state, to redress an alleged usurpation of office or corporate franchises, he is not liable, officially or otherwise, to the defendant for costs in case the proceedings fail.

The attorney general, on behalf of the state, petitioned this court for a writ of quo warranto to require the respondent village and its officers to show quo warranto they held and exercised their respective offices, and on return of the writ that they be ousted therefrom and the incorporation of the respondent village be declared void. Among other allegations, the petition alleged that ninety-nine acres of unplatted land, lying north of the Chicago & Northwestern railroad track, and belonging to one estate, were entirely separated and cut off from access to the platted part of the village by the railway and by the right of way fences, and by a stretch of low wet ground which could not be built upon or used for village purposes; that one hundred seven acres in the unplatted part of the village, belonging to one person, were cut off from access to the platted portion by intervening lands, and there were no streets or alleys extending to them; that lands which were accessible to the platted portion and adjoined them on the west, and were accessible from the east and west highway, were not included in the territory embraced by the village; that the lands so omitted have been owned ever since 1907 by two of the petitioners for the organization of the village; that police protection was not required and would not naturally extend beyond the platted portion; that there was not likelihood that light or water plants, or municipal enterprises of any kind, would be extended beyond the platted portion; that the object of including the lands outside the platted portion was to levy taxes thereon for village purposes, although such lands were in no manner benefited by the proposed village government.

In their answer the respondents set up the proceedings by which respondent village was incorporated, and alleged that the lands outside the platted portion pertain to and are so conditioned as properly to be subject to village government, that all of the unplatted portion was within one hundred rods of that which was platted; that the

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land west of the west line of the village was low and crossed by three creeks; that there were four bridges over such creeks which would involve heavy expense for maintenance and repair, and for this reason and because of its condition it was not included within the village, and not because it was owned by two of the petitioners for the incorporation. They alleged that the reason land further north was not included was on account of the existence of a large iron bridge just outside the present limits of the village and the expense of keeping up this bridge was the chief reason for omitting it.

The writ issued, and a referee was appointed, who took and returned to the court the testimony taken. Writ discharged.

George T. Simpson, Attorney General, *Codman & Miller,* and *Webber & Lees,* for relator.

Burt W. Eaton and *Callaghan & Granger,* for respondents.

LEWIS, J.

This proceeding was commenced to test the validity of the incorporation of the village of Dover. The territory is one mile square, and includes the east quarter of section 21 and the west three quarters of section 22, in Dover township, Olmsted county. At the time of incorporation, in December, 1908, the platted portion comprised seventy-five acres in a compact body, as will appear from the plat. The unplatted portion consists of five hundred sixty-five acres, mostly to the south and east of the village proper. To be more accurate, it is about one hundred sixty rods from Oak street to the east line of the corporation, and about two hundred rods from the south line of the platted part to the south line of the corporation; whereas, it is only about forty rods from Sheek street on the west to the west line, and a like distance between the northernmost platted part and the north line. The unplatted portion to the northeast and to the east and south is suitable and used for agricultural purposes.

The village proper is divided by the Chicago & Great Western Railway, which crosses east and west on Center street, while the Chicago & Northwestern Railway passes in a northwesterly and southeasterly direction adjoining the platted part on the north. At

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the time of incorporation the population was two hundred forty-four, and at the general election in November, 1910, sixty-five votes were cast, and at the election to incorporate in December, 1908, fifty-five votes were cast. The assessed valuation of the unplatted real estate in 1910 was $12,875, and of the platted real estate $28,530. The total personal property, assessed valuation, was $34,377. Eight families, consisting of thirty-four persons, resided on the unplatted part. In the village proper are located the usual quota of business houses, shops, and factories, consisting of two depots, a Woodmen hall, post office, bank, three stores, a creamery, machine shop, lumber yard, printing office, three elevators, stockyards, a high school and a graded school, with eighty pupils, and one church. The village is the center of a populous and rich farming district, and its nearest competitors for trade are the villages of Eyota, six miles to the west, and St. Charles, four miles to the east.

The evidence discloses that the northern boundary was extended beyond the railway right of way, for the purpose of taking in a pond, with ice privileges and a gravel bed, and at the same time was limited to leave out a steel bridge across a creek on Chatfield street extended. The western boundary was fixed to avoid the responsibility of maintaining three bridges across a creek, and it is claimed that it was not desirable to include certain low overflow land along the creek bottom. It was also claimed that the line was extended to the east and south to secure a compact body of land one mile square which would be suitable for village purposes.

In the absence of constitutional limitations, the legislature is at liberty to exercise its judgment as to what territory shall be included within incorporated villages. In this state it has been deemed best to establish certain rules by legislative enactment for the guidance of those communities desirous of establishing the village form of government. One statutory limitation is that, if unplatted lands are taken in, they must adjoin the platted lands; but there is no attempt to limit the extent of the unplatted part. That must necessarily depend on the conditions of each particular case. Another statutory limitation is that the unplatted lands must be so conditioned as to be properly subject to village government. The statute

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recognizes the necessity of including such territory, but this does not mean that lands used for agricultural purposes cannot be included. It does not mean that there must be a present necessity for such lands for building or other village purposes. It is not necessary that all such lands shall be platted, graded, or used for village purposes at any particular time in the future. Adjoining lands may be brought within the limits of the corporation and be subjected to village government, if it may fairly be said that there exists, or may exist within a reasonable time in the future, a unity of interest in the enforcement of the law, such as police patrol and the public health.

It is not an objection that other adjoining territory was omitted which might have been included. The exclusion of adjoining territory, which might have been included, does not condemn as arbitrary the inclusion of territory which might have been excluded. The eastern and southern tier of forties might have been omitted, or the next tier of forties to the west and north might have been included, with the result that the platted part would be more nearly in the center. But it is not a requisite that the nucleus be in the center. The Taylor farm to the east, and the Demro land to the south, may be too far away to secure immediately the same water, light, and sewer privileges enjoyed in the platted portion. But it does not appear why they should not be entitled to police and fire protection. They certainly have the privileges of the schools. The taxes upon these lands may be slightly increased, and the present benefits may not be fully compensatory. But the law does not require equality in such cases. Lands so located as to be easily accessible to the advantages of schools and market privileges are naturally enhanced in value for that reason, and their inclusion within the corporate limits is a contingency which may reasonably be anticipated.

The line must be drawn somewhere. What territory shall and what shall not be included is a question of fact, to be determined by the people immediately interested. The soundness of their judgment in passing on the question must be tested as questions of fact in other cases are tested on appeal. If the evidence reasonably tends to show that the decision is within the statute, then the courts

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cannot interfere. The case differs radically from the following cases: State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972, 25 L.R.A. 755; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613; State v. Village of Holloway, 90 Minn. 271, 96 N. W. 40; State v. Village of Gilbert, 107 Minn. 364, 120 N. W. 528. In State v. Village of Alice, 112 Minn. 330, 127 N. W. 1118, the very sweeping statement of facts in the answer was sustained, under the liberal rule applied to the construction of pleadings on demurrer.

It is our opinion that it fairly appears that the corporate limits were adjusted in the reasonable exercise of the judgment of the voters, and that the inclusion of the lands belonging to the objectors was not arbitrarily included for the purpose of exacting revenues without compensation.

Writ discharged.

JAGGARD, J., took no part.

Costs having been taxed against the attorney general, he appealed from the clerk's taxation, and on March 28, 1911, the following opinion was filed:

PER CURIAM.

This was a proceeding by information of the attorney general, in the nature of quo warranto, against the village of Dover, to determine by what right it exercised the powers of a municipal corporation. The clerk taxed costs in favor of the respondents and against the attorney general. He appealed from the taxation.

An information in the nature of quo warranto, as respects procedure, is governed by the common law, as modified by Statute 9 Anne, c. 20, and our own statutes. State v. Sharp, 27 Minn. 38, 6 N. W. 408. The right to costs in such cases is purely statutory. Costs were awarded by the statute of Anne against the defendant when he failed, and in his favor when he prevailed, against the person upon whose relation the attorney general instituted the proceed-

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ings, if his name was brought upon the record. State v. Village, 32 Vt. 50.

Our statute, R. L. 1905, § 4350, is substantially to the same effect, which provides that: "Whenever an action or proceeding is instituted in the name of the state on the relation or petition of any citizen, such relator or petitioner is entitled to, and liable for, costs and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name."

It is obvious that this statute has no application to the attorney general in cases where he institutes the proceeding in his official capacity. The attorney general, however, when he institutes quo warranto proceedings on the information of a private party, may in his discretion join such party as a relator, who, in case the proceedings fail, will be liable to the defendant for costs. This course was adopted in the case of State v. Sharp, 27 Minn. 38, 6 N. W. 408. It would seem that such a course is only fair and just to the defendant, when the attorney general acts upon the information of private parties, who are permitted to prosecute the proceeding by attorneys of their own selection. See, in this connection, State v. Probate Court of Rock County, 67 Minn. 51, 69 N. W. 609, 908.

Where, as in this case, quo warranto proceedings are instituted by the attorney general, as the representative of the sovereignty of the state, to redress an alleged usurpation of office or corporate franchises, he is not liable, officially or otherwise, to the defendant for costs in case the proceedings fail. State v. Boston, 25 Vt. 433; Attorney General v. Illinois, 85 Ill. 516; Houston v. Neuse, 53 N. C. 476. This conclusion necessarily follows from the rule that the state, like any other sovereign, does not pay costs unless otherwise provided by statute. 3 Blackstone, Com. 400. This is a proceeding by the state on the relation of the attorney general, an action by the state, and there is no statute making either liable for costs.

This case is clearly distinguishable from that of Bartles Oil Co. v. Lynch, 109 Minn. 487, 491, 124 N. W. 994, which was an ordinary civil action, in which the statute allows costs, to restrain the defendant, who was state oil inspector, from interfering with the plaintiff's business of selling a particular brand of illuminating oil.

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The defense was that the sale of the particular brand was forbidden by statute, and that it was the defendant's official duty to prevent its sale. But the proposed sale was not illegal, and the defendant had no right, officially or otherwise, to interfere with it, and his attempt to do so was his individual act, precisely as if the statute under which he claimed to act had never been enacted.

Clerk's taxation reversed.

DULUTH TERMINAL RAILWAY COMPANY v. CITY OF DULUTH.[1]

February 17, 1911.

Nos. 16,793—(222).

Priority of franchise over condemnation proceedings — evidence.

The city of Duluth, by ordinance, granted to the Duluth-Thunder Bay Railway Company a franchise on specified terms and conditions to construct a railway along Arthur avenue extended. Said company accepted the ordinance and is constructing the railway. Prior to the passage of this ordinance, but subsequent to its introduction in the city council, the petitioner herein instituted condemnation proceedings to acquire the right to construct a railway along the same portion of the street. The two rights being inconsistent, the franchise granted by the ordinance is the prior and superior right, and the city of Duluth had such an interest in the contract ordinance that it could introduce such grant in evidence, and base thereon an objection to the prosecution of the condemnation proceedings instituted by the petitioner; the Duluth-Thunder Bay Railway Company not objecting to such proceedings.

Right of way upon city or village street — amendment by act of 1893.

Chapter 74, Laws 1893, an amendment to section 1 of title 1 of chapter 34, G. S. 1866, provided that no corporation formed under this title shall have any right to construct, maintain, or operate upon or within any street of any city or village a railway of any kind, without first obtaining a franchise therefor from such city or village. This provision was in direct partial conflict with the provision of section 29 of said chapter, authorizing railway

[1]Reported in 130 N. W. 18.

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companies to acquire, by condemnation, the right to occupy any road, street, or alley for the necessary location of its railroad. To the extent of such conflict, section 29 was amended, and the right therein given a railway company to appropriate, through condemnation proceedings, such portion of highways as may be necessary for the construction of its road, without first obtaining a franchise, was limited to highways outside of cities and villages.

Effect of act.

The amendment of 1893 applies to action taken thereafter, but with reference to such action the section is construed as if originally enacted in its amended form. It therefore limits the power conferred on all corporations organized thereunder, whether organized prior to or after 1893.

Obligation of contract not impaired by act.

The placing of such limitation on the power of eminent domain, by an amendment to the general law conferring the power, did not impair the obligation of a contract or destroy any property right.

Revised Laws 1905.

The provisions of the statutes referred to were carried forward into the Revision of 1905 under a different arrangement of and subdivision into sections. But by such rearrangement no alteration was apparently intended, and none was therefore made in the existing law.

Right of way upon city or village street — condemnation.

A railway company, organized under title 1, c. 34, G. S. 1878, whether organized before or since 1893, is not authorized by the laws of this state, special reference being had to sections 2841 and 2916, R. L. 1905, to acquire by condemnation proceedings the public easement in any portion of a street within a city or village to construct, maintain, or operate a railway of any kind along such street. A franchise must first be obtained from the city or village before such railway company can acquire such right to construct, maintain, or operate a railway along a street therein.

The Duluth Terminal Railway Company, a common user railway having tracks but no trains, petitioned the district court for St. Louis county to condemn a right of way for the construction of an elevated double track extension of its existing elevated railway at a general height of about twenty-two feet above the surface of the ground, and at all places of sufficient height to permit the passage thereunder of public travel, vehicles, foot passengers and street railroads, to an abutment of the bridge of the Duluth & Superior Bridge Company, called the Interstate bridge. The Duluth & Superior Bridge Company filed an answer alleging that, under the act of congress authorizing the construction of the bridge (28 St. c. 64) it was

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the only person or corporation authorized to construct and operate approaches to its bridge, and as it was able and willing to construct such approach for railway purposes in strict accordance with the terms of the act, it prayed for the dismissal of the petition. The Duluth-Thunder Bay Railway Company filed no answer or objections to this petition.

At the hearing before Dibell, J., the city of Duluth objected to the proceeding, and the appointment of commissioners, upon the ground that the property described in the petition constituted a part of the public highways, streets, avenues and alleys of the city, and upon the ground that it is a condition precedent to the right of petitioner to use such property that it first obtain from the city a franchise, and compensate the city for such franchise; that petitioner has not obtained such franchise, has not applied to obtain such franchise, and has no right whatsoever to condemn property in the streets or highways of the city; that the control of the location of railway tracks on the streets within the city is especially vested in the common council of the city, that the common council has not given petitioner permission to locate its tracks within the city, and on the further ground that the common council has granted the rights to other corporations to use portions of the property sought to be condemned by the petitioner, and has prescribed terms and conditions upon which such property in the streets and highways of the city may be used by public service corporations; that petitioner has not in any way complied or offered to comply with such terms and conditions, and upon the further ground that this is an attempt in condemnation proceedings to litigate the validity of a right, which petitioner claims, to use certain streets of the city, and in this proceeding the court has no jurisdiction to determine such controversy.

When the petitioner rested, the city moved to dismiss the petition upon the grounds: (1) That this was an attempt to litigate the validity of a certain ordinance of April 30, 1888, and the rights in the streets claimed thereunder by the petitioner as to all of the property involved in the proceeding, except Arthur avenue extended; (2) that as to Arthur avenue extended no consent of the city

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to the use of the street for the construction of railroad tracks was shown; (3) that as to Arthur avenue extended the evidence showed petitioner had knowledge of the negotiations between the city and the Duluth-Thunder Bay Railway Company which resulted in a franchise from the city to the company; (4) that the petitioner had failed to show the necessity. The motion to dismiss was denied. The court made findings, covering the facts stated in the first four paragraphs of the opinion, and as a conclusion of law dismissed the proceeding. From that order, petitioner appealed. Affirmed.

J. A. Murphy, and *Baldwin, Baldwin & Dancer,* for appellant.

Bert Fesler, for respondent city.

SIMPSON, J.

This is a condemnation proceeding instituted by the Duluth Terminal Railway Company. The Duluth-Thunder Bay Railway Company condemned certain lands in the city of Duluth, and laid out a proposed railway line over such lands and along Arthur avenue extended, a street in the city of Duluth, connecting with the Interstate bridge. Later an ordinance was introduced in the city council of the city of Duluth, granting to the said Duluth-Thunder Bay Railway Company, upon certain specified terms and conditions, the right and franchise to erect and maintain a single or double track railway upon a trestle from said Interstate bridge, along said Arthur avenue extended, for a distance of some six hundred feet, and thence along a designated route. This ordinance was in due course thereafter passed and approved January 13, 1909. The Duluth-Thunder Bay Railway Company duly accepted the franchise thereby granted, and agreed to perform all acts and things by the terms of the ordinance required of it, and thereupon commenced constructing the trestle provided for therein.

After this ordinance was introduced, and shortly before its passage, the Duluth Terminal Railway Company instituted these condemnation proceedings, and thereby seeks to acquire, among other lands, for use for the construction of an extension of its line of railway, the strip of land in Arthur avenue extended, over which, by the ordinance referred to, the Duluth-Thunder Bay Railway Com-

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pany was granted the right to construct and maintain a railway line. The Duluth Terminal Railway Company was organized in 1887 under title 1, c. 34, G. S. 1878. In 1888 the city of Duluth granted it a franchise to construct railway tracks on certain named streets for operating a line of railway and for furnishing trackage connections to other railroads. Beginning about two years thereafter it constructed several miles of terminal or connecting tracks, and has since maintained them, furnishing thereby trackage facilities for such other railway companies as desire to use the same. This proposed extension along Arthur avenue is desired to connect its present tracks with the tracks on the Interstate bridge.

Among the terms contained in the ordinance granting the franchise to the Duluth-Thunder Bay Railway Company to construct and maintain tracks over Arthur avenue extended, connecting with the Interstate bridge, was the requirement that all other railway companies should be permitted to use such tracks to their capacity, upon conditions substantially like those imposed by the ordinance upon the owning company. Thereby the elevated structure being built by the Duluth-Thunder Bay Railway Company is made to afford access to the Interstate bridge for railway companies of much the same character and convenience which would be afforded if such tracks were constructed by the petitioner. It is entirely impracticable to have more than one such approach to the bridge along Arthur avenue extended.

Upon the hearing on the petition the court found, in addition to the facts above stated, that the public interest does not require the track proposed to be constructed by the petitioner, and directed the entry of judgment dismissing this proceeding. From such order the petitioner appeals. The city of Duluth appeared in the court below in opposition to the proposed condemnation, and appears in this court as respondent.

By the appeal, three questions are raised in this court for determination:

1. Did the city of Duluth have the right on the hearing to introduce evidence tending to show a prior right or easement of the Duluth-Thunder Bay Railway Company in Arthur avenue extended, and

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to interpose such prior easement as an objection to the taking of the same land by the appellant; the Duluth-Thunder Bay Railway Company not objecting?

2. Is the right of the Duluth-Thunder Bay Railway Company to the use of the strip of land in Arthur avenue extended for connecting railway tracks superior to the right herein sought to be acquired by the appellant?

3. Can the petitioner, by condemnation proceedings, acquire the right to construct, maintain, and operate its railway upon a street in the city of Duluth; it not having first obtained from said city a franchise conferring such right?

The fundamental question is the last one above stated, involving, as it does, the power of the appellant, under the laws of the state, to acquire the right here sought in Arthur avenue extended by condemnation proceedings.

Section 2916, R. L. 1905, is as follows: "When, in the location of any railroad, it becomes necessary to occupy any road, street, alley, or other public way, the municipal corporation or other public authority owning or having charge thereof and the railroad company may agree upon the manner, terms, and conditions in and upon which the same may be used or occupied, or such corporation may appropriate so much of the same as shall be necessary by condemnation proceedings under the right of eminent domain." This provision, in substantially its present form, was contained in the Revised Statutes of 1866. Under it the public easement in a street or highway, as well within cities and villages as in country districts, could be and was frequently acquired by condemnation proceedings. Kaiser v. St. Paul, S. & T. F. R. Co., 22 Minn. 149; Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 188 (215); Adams v. Hastings & D. R. Co., 18 Minn. 236 (260).

Section 2841, R. L. 1905, is as follows: "Corporations may be organized for the construction, acquisition, maintenance, or operation of any work of internal improvement, including railways, street railways, telegraph and telephone lines, canals, slack-water, or other navigation, dams to create or improve a water supply or to furnish

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power for public use, and any work for supplying the public, by whatever means, with water, light, heat, or power, including all requisite subways, pipes, and other conduits. But no corporation so formed shall construct, maintain, or operate a railway of any kind, or any subway, pipe line, or other conduit in or upon any street, alley, or other public ground of a city or village, without first obtaining from, and compensating said city or village for, a franchise conferring such right."

The last part of section 2841 in terms applies to the construction, maintenance or operation of a railway of any kind upon any street of a city or village by corporations organized to construct and operate railways. Its apparent force and effect is to limit the authority to appropriate, by condemnation proceedings, so much of highways, roads, and streets as may be necessary in the location of a railroad, conferred by section 2916, to such highways as are not within the limits of cities or villages. To ascertain clearly the relationship of the two sections, it is necessary to examine their history and the provisions of the law therein, as they existed prior to the revision of 1905.

Title 1, c. 34, G. S. 1866, provides for the organization of corporations having the right of eminent domain. Sections 1 and 29 of this title, the two sections involved in the present inquiry, are as follows:

"Section 1. Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein."

"Sec. 29. If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as

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may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals."

Eliminating amendments and provisions not material here, by chapter 74, p. 189, Laws 1893, section 1 was amended "so as to read as follows," by adding to it the following provision: "But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village, a railway of any kind or any subway, pipe line or other conduit for supplying the public with water, gas light, electric light, heat, power or transportation or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making just compensation therefor, as herein provided."

Clearly this amendment had the same effect upon section 29 as if it had been added to it, instead of to section 1. By its terms the amendment applies to all corporations organized under title 1. The corporations referred to in section 29 are organized under title 1 and are as directly related to section 1 as any other corporations organized thereunder. Title 1 relates to one subject. The division into sections is not important in determining the meaning of the provisions contained in the title. In meaning and effect sections 1 and 29, as originally enacted, were one law and could be read consecutively. An amendment to such law necessarily changed all parts of the law in conflict with the amendatory provision. The amendment was appropriately put after section 1, instead of section 29, because it related to other structures as well as to railroads; but the amendment, in so far as it in terms relates to railroads, limits the right to take property or an easement therein for the construction of "a railway of any kind," and applies directly and manifestly to the right given in section 29. An examination of title 1 shows that it could have no other application.

As stated by Justice Mitchell, in Stevens v. City of Minneapolis, 29 Minn. 219, 12 N. W. 533: "The great fundamental rule in construing statutes is to ascertain the intent of the legislature, and to

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attain this object every part of a statute must be considered in connection with the whole, so as, if possible, to give effect to every part." The legislature, in 1893, clearly intended to place a limit on the theretofore existing power of railway corporations to acquire, by condemnation, a public easement in highways for railroad purposes. Section 29 contained the theretofore existing power, and must yield to the limitation contained in the amendment.

The position that this amendment did not apply to section 29, because it was general and applied to other structures as well as railways, while section 29, containing a conflicting provision, was limited to railways, is clearly untenable. It ignores and makes meaningless the inclusion specifically of "railways of any kind" among the structures covered by the amendment. The same rule might equally well be applied to the other structures mentioned, and thus the entire amendment would be meaningless. In fact, this amendment, limiting as it does, the right of condemnation as to a particular class of streets, is the more special act. A grant of power to railways organized under section 1 to condemn a right of way upon all streets is directly in partial conflict with the amendment to section 1 providing that railways so organized shall not possess that right as to city streets, and because of such partial conflict the amendment necessarily modifies the power by limiting it to streets outside of cities.

Nor is there any basis for the suggested construction that section 1, as amended, be read as if the word "hereafter" were inserted in it, and section 29 as if the words "heretofore organized" were inserted in such section. Section 1 is the foundation section providing the method of organization of all corporations embraced in title 1. When amended, it still so provides, and necessarily refers to the same corporations that section 29 refers to. The amendment, going as it does to a particular power of corporations, applies, of course, to the exercise of that power thereafter and not theretofore. But section 1, as a law, dates back to its enactment, and not to the date of the amendment, and applies to corporations organized before the amendment, as well as to those organized after. St. Paul, M. & M. Ry. Co. v. Broulette, 65 Minn. 367, 67 N. W. 1010; City of Duluth

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v. Duluth Telephone Co., 84 Minn. 486, 87 N. W. 1127; Sutherland, St. Const. § 237.

These provisions were carried forward into the Revised Laws of 1905. By the consolidation, in the Revised Laws, of titles 1 and 2 of the former statutes, and the rearrangement and new division of the various provisions of the law into sections, the relation to each other of the sections under consideration is not as apparent as it was before the revision. But an examination of these provisions, as contained in the Revised Laws, in connection with the statutes as they theretofore existed, discloses no purpose to change the former meaning or effect. Changes made by a revision will not be construed as altering the law, unless it is clear that such was the intention. Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.

Neither section 2926 nor section 2838, R. L. 1905, affects the question under consideration. Nor does the fact that the tracks along Arthur avenue extended connect at one end with a bridge over navigable waters in any way affect the question here involved. Such fact tends strongly to show the necessity of the use of the street for railway purposes; but section 2841 does not contemplate the prevention of proper public improvements. It undertakes to regulate the manner in which a public easement under control of a branch of the state may be transferred to a public service corporation.

Under this construction given to the amendment of 1893, that it limited the theretofore existing right of eminent domain and took away the right of the appellant to acquire, without a franchise, by condemnation, a right of way in Arthur avenue extended, the amendment does not impair a contract right or privilege granted to respondent by the state. Admittedly appellant never acquired nor had any right to construct a track on Arthur avenue extended. By the present condemnation proceeding it is seeking to acquire that right. By an ordinance of the city of Duluth it was given a right to construct its tracks on several streets named therein. Arthur avenue extended was not included, and in fact there was no such street at the time the ordinance was passed. The respondent, in common with all other railways, had the right, prior to the amendment of 1893, to institute condemnation proceedings to acquire a right of

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way on city streets. Any easement acquired under the power became a property right and is protected; but the power, not exercised, conferred by general law, to acquire specific property by condemnation, was not a property right, nor a matter of contract with the state, but was a matter of general law, and as such subject to modification. In Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838, it was held that "where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines."

Such a change as is here involved in the law governing the exercise of the power of eminent domain does not impair any contract right of corporations possessing that power. In Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. ed. 267, it was held that the state could modify the right of eminent domain given the plaintiff company by its charter, and, referring to damages in condemnation proceedings, it was stated: "Although it may have been the law in respect to the defendant, prior to the constitution of 1873, that under its charter, and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the constitution of 1873, that it should always be exempt from such liability, or that the state, by a new constitutional provision, or the legislature, should not have power to impose such liability upon it, in cases which should arise after the exercise of such power. * * * The provision contained in the constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the state." Wisconsin v. Cornell University, 52 Wis. 537, 8 N. W. 491; Chattaroi v. Kinner, 81 Ky. 221; People v. Adirondack, 160 N. Y. 225, 54 N. E. 689; Village of Hyde Park v. Oakwood, 119 Ill. 141, 7 N. E. 627.

The appellant refers to Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A.

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175, and City of Duluth v. Duluth Telephone Co., supra, as sustaining its position in this proceeding.

This court, in Northwestern Tel. Exch. Co. v. City of Minneapolis, held that under chapter 12, § 1, p. 106, Laws 1860, as amended by chapter 73, p. 84, Laws 1881, a telephone company was given the right to erect and maintain its poles and wires along the public roads and highways in this state, and that the words "public roads and highways" included streets and alleys in cities. It was further held that where a telephone company had, under that law, erected poles and wires in the streets of the city of Minneapolis in accordance with the direction of the city council, the city council was thereafter powerless, arbitrarily and without cause, to remove the poles and wires from the street; such attempted removal not being an exercise of the police power or a regulation to promote the safety or convenience of ordinary travel on the streets. The important and debatable point covered by this decision, as finally announced and construed by the same court in a later case, was the interpretation of the words "roads and highways" in this law to include city streets. With such interpretation, and the fact thereby established that the telephone company had erected an extensive and costly system of poles and wires in the streets of the city of Minneapolis, under authority of and in reliance on the right so to do conferred by the state law, it followed that an order for the removal of all poles and overhead wires, if such order was arbitrary, unreasonable, and not designed for the protection or convenience of other uses of the street, was a prohibited destruction of the property rights of the company, and therefore void. In City of Duluth v. Duluth Telephone Co., supra, the stated rule of the Minneapolis telephone case was adhered to and applied to a telephone company which had established a system of poles and wires in the streets of the city of Duluth under the authority of the state law above referred to.

The facts upon which the decisions were based in the telephone cases clearly distinguish them from the present case. In those cases the telephone companies had, under authority of the state law, entered upon the streets and erected a system of poles and wires, and were resisting attempts to remove such poles and wires therefrom.

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In the present case the appellant is seeking, by this proceeding, for the first time to acquire a right to construct a railroad along Arthur avenue extended.

In Minneapolis & St. P. Suburban Ry. Co. v. Manitou Forest Syndicate, 101 Minn. 132, 112 N. W. 13, the effect of section 2841, R. L. 1905, was considered, and it was stated that this section applied to all cases where it is the intention to make use of a city or village street for the purpose of operating a railway along the same, and that in such cases a franchise must be obtained from the city or village, and that the power granted by section 2916 to this extent was limited and modified by section 2841.

The petitioner is seeking, in this proceeding, to acquire a right to construct a railway along Arthur avenue extended, a street in the city of Duluth, without obtaining a franchise from the city so to do. It cannot so acquire that right. We hold that the general laws of this state—special reference being had to sections 2841 and 2916, R. L. 1905—do not authorize a railway company, whether organized before or since 1893, to acquire, by condemnation proceedings, the public easement in any portion of a street within a city or village to construct, maintain, or operate a railway of any kind along such street, and that a franchise conferring such right must first be obtained from the city or village before a railway company, organized under the general laws of this state, can acquire the right to construct, maintain, or operate a railway along a street in such city or village. We limit this decision to the construction of a railroad along a street. The power of a railway company to acquire, by condemnation, the right to construct tracks across a city or village street, is not involved in these proceedings, or, if involved, was not considered in the court below, and was not discussed by counsel in this court. By so limiting the decision, however, we do not suggest that this court has determined that chapter 74, Laws 1893, does not apply to a railroad crossing a city street.

An extended discussion of the other questions raised by appellant is unnecessary. The city of Duluth had authority, by its charter, and under section 2841, R. L. 1905, to grant the Duluth-Thunder Bay Railway Company a franchise to construct a railway on Arthur

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avenue extended. Because of such grant of a franchise with terms attached thereto, and the acceptance of the same by the railway company, if on no other ground, the city had such an interest in the contract and the performance thereof by the railway company that it could introduce the same in evidence and base thereon an objection to the petitioner's application to acquire a conflicting easement in the street. And the right so acquired by the Duluth-Thunder Bay Railway Company was prior and superior to the right sought to be acquired by the petitioner, and this would be true without regard to the effect of section 2841, R. L. 1905. Under section 2916, R. L. 1905, two methods are provided by which the right to construct a railway along a highway may be acquired; i. e., by agreement with the authorities controlling the highway, or by condemnation. In the present case, before the petitioner instituted these proceedings, the city council of Duluth, the authority in control of Arthur avenue extended, had put on its passage an agreement with the Thunder Bay Railway Company permitting that company to occupy such street, and in due course this agreement was consummated by the passage and approval of the ordinance and its acceptance by the railway company. The right of the Thunder Bay Railway Company is therefore based on a lawful proceeding instituted prior to the condemnation proceedings herein, and would be, for that reason, a prior and superior right. People v. Adirondack, 160 N. Y. 225, 54 N. E. 689; Chattaroi v. Kinner, 81 Ky. 221.

Affirmed.

JAGGARD, J., took no part.

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LARS LARSON TENDALL v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 17, 1911.

Nos. 16,806—(201).

Vice principal — questions of fact.

While a wrecking crew was engaged in raising a box car, plaintiff was directed by the foreman to take a position at one end of the car, which remained fastened when the power was applied, and to pry up with a pinch bar. The foreman assisted with another bar, when the car suddenly swung towards the plaintiff and caught his foot under the bar. *Held:*

1. The foreman was a vice principal.

2. Whether defendant was guilty of negligence in ordering the plaintiff to assume a dangerous position without proper instructions or warning was a question of fact.

3. It was also a question of fact whether plaintiff assumed the risk.

Action in the district court for Kandiyohi county to recover $10,000 for personal injuries sustained while in defendant's employ. The facts are stated in the opinion. The case was tried before Qvale, J., and a jury which returned a verdict in favor of plaintiff for $870. From an order vacating and setting aside the verdict and ordering judgment for defendant notwithstanding the verdict, plaintiff appealed. Reversed and verdict reinstated.

Ludvig Arctander and *R. W. Stanford,* for appellant.

J. D. Armstrong, C. H. Winsor, and *Samuel P. Porter,* for respondent.

[1]Reported in 130 N. W. 22.

[Note] Vice-principalship considered with reference to rank of superior servant, see note in 51 L.R.A 513.

Vice-principalship as determined with reference to character of act causing injury, see note in 54 L.R.A. 37.

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LEWIS, J.

Respondent sent a wrecking crew and wrecking car in charge of its foreman, Landberg, to remove a box car, which was resting on old cross-ties on the ground. Landberg spotted the wrecking car on an adjacent track, caused the boom or crane to be placed in position over the box car, and a chain to be placed around its middle, which was hooked to the crane. The end of the crane stood at a point about two feet west from the middle of the car, with the result that when the crane was raised the strain was applied laterally towards the west, and the east end of the box car was lifted from six inches to a foot; but the west end was held by a projection in one of the cross-ties and by the ice. Landberg caused the box car to be left in that position, and attempted to release it with a pinch bar, which he applied to the north side, next to the wrecking car, close to the west end. Failing to release it, he directed plaintiff to apply another pinch bar at the west end of the car, near the southwest corner. Two other men assisted plaintiff, and Landberg returned to the north side, and all of them were engaged in prying, when the car became loose, slid along close to the ground to the west towards plaintiff, caught the pinch bar, and pressed it to the ground, with plaintiff's foot pinioned underneath.

Negligence is charged in ordering plaintiff to assume a dangerous position in which to work without proper warning or instruction. Plaintiff secured a verdict, and on motion the court granted judgment notwithstanding the verdict, upon the ground that the foreman and plaintiff were fellow servants and that appellant assumed the risk.

It was conceded at the argument that Landberg was a vice principal up to the time all began to pry up the car; but it was claimed that they then became engaged in a common enterprise, and the relation of vice principal and laborer ceased. A little reflection will disclose the fallacy of this position. If the plaintiff was subject to the control of the master at the time, and in obedience to orders took a position at the west end of the car for the purpose of applying the bar, at what particular point of time did the relation of master and servant cease? If the relation existed up to the time plaintiff took

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his position, it continued to exist while engaged in carrying out the orders. And if plaintiff had the right to assume that the master would exercise due care for his protection, then Landberg's action in assisting to lift the car did not convert himself from a master into a fellow servant. The servant was justified in remaining at his post with the assurance that his superior would exercise reasonable care to protect him. Barrett v. Reardon, 95 Minn. 425, 104 N. W. 309; Cody v. Longyear, 103 Minn. 116, 114 N. W. 735.

Whether the defendant was negligent was fairly a question of fact. It is plain, from the manner in which the crane was placed and the chain attached, that the car would not rise evenly when the power was applied. As the car arose, and it became manifest that the west end was fastened, Landberg must have known that there would be a decided lateral movement when that end was released. The plaintiff was entitled to the judgment of the jury whether or not the man in charge of the operations should have anticipated the result which followed.

Whether plaintiff assumed the risk was also a question of fact. His conduct must be judged by his experience, his means of observation, and by the fact that he was subject to the orders of his superior. The case was properly submitted to the jury, and the trial court was in error in directing judgment for defendant notwithstanding the verdict.

It is therefore ordered that the order appealed from be reversed, and that the verdict be reinstated.

JAGGARD, J., took no part.

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E. P. CONWAY v. CHARLES H. WOOD & COMPANY.[1]

February 17, 1911.

Nos. 16,857—(221).

Negligence — questions for jury.

Action to recover damages for personal injuries. It was the plaintiff's duty to deliver express packages at defendant's hotel for its guests, which were to be delivered at its baggage room and receipt given by its clerk. He there delivered the packages, and in attempting to go from the room, along what he believed to be a passageway, to the clerk's desk to look for the porter and to get a receipt for his package, he fell into the shaft of the baggage elevator; the door leading to it being then open. Verdict for plaintiff. *Held*, that the defendant's negligence, the plaintiff's contributory negligence, and whether he was at the place of injury by the implied invitation of defendant, were made, by the evidence, questions of fact for the jury.

Action in the district court for Hennepin county to recover $7,500 for personal injuries. The facts are stated in the opinion. The answer admitted that on or about May 8, 1909, plaintiff came to the baggage room of defendant's hotel, for the purpose of delivering certain packages, and while waiting in the baggage room to ascertain if the addressee named on the packages was a guest at the hotel, wandered aimlessly about, opened the door leading into the elevator shaft and fell down the shaft, inflicting the injuries for which he sought damages, but specifically denied that the injuries were caused by any want of care of defendant. The case was tried before Booth, J., and a jury which returned a verdict in favor of plaintiff. From the judgment for $971.97, entered pursuant to the verdict, defendant appealed. Affirmed.

Morton Barrows, for appellant.

Daniel F. Carmichiel, for respondent.

[1]Reported in 129 N. W. 1045.

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START, C. J.

Appeal by the defendant from a judgment of the district court of the county of Hennepin in an action to recover damages for personal injuries sustained by the alleged negligence of the defendant. The sole question presented by the record is whether the trial court erred in denying the defendant's motion, made at the close of the evidence, to direct a verdict for the defendant.

There was evidence tending to show, with others, these facts: The defendant, at the times herein stated, was the proprietor and manager of the West Hotel, Minneapolis, located on the corner of Hennepin avenue and Fifth street. The plaintiff was a driver for an express company, whose duty it was to deliver express packages at the West Hotel and other places in the city. The baggage room of the hotel, where heavy express packages were required to be delivered, was, until shortly before the plaintiff's injury, located on the Fifth street side of the building. He was familiar with this room and its location with reference to the clerk's desk in the lobby, and when he delivered packages at this room the man in charge would give him a slip and he would take it to the clerk and get his receipt signed. There was a passageway from the baggage room to the lobby, where the clerk's desk was located. Before the accident the baggage room was moved to another location in the building, fronting south on the alley. The plaintiff was never inside this room until the day he was injured, May 8, 1909. On that day he had large packages to be delivered to a guest of the hotel, and drove his wagon to the door of the baggage room on the alley, deposited the packages on the floor of the room, and presented to the porter in charge the usual form of a receipt for the signature of the hotel clerk. The porter took the slip, and said he would go to the office and see if the person to whom the packages belonged was in the house, and then left the room. The plaintiff did not notice how or where the porter left the room, or the direction taken by him. He expected the porter to return with the receipt, and waited for him on the wagon. After waiting for a reasonable time he started to find the porter to get his receipt. He went into the baggage room, which was dimly lighted; it being some thirty feet square and nine feet high. It had only one

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outside door and window. He noticed a lighted elevator going up, to the left at the rear of the baggage room. It was not the shaft of this elevator into which he fell. The porter was not there.

The testimony of the plaintiff as to what then occurred is this: "I made up my mind I was going to find him" (the porter) "and get my sheet. I started in at the right-hand side of the baggage room at the rear. I seen a door open there, and it looked to me like a passageway. It was dark in there, no light, and I didn't see anybody around in there, and I knew that the clerk's desk was behind that partition there some place—on the other side of that door, it looked to me; and I started through there, and I fell, and that is all I remember. * * * Q. Did you know anything about the existence of the elevator shaft at the place where you fell, before the accident occurred? A. No, sir. Q. Did you see any lights in the baggage room at the time you last went in there before you got hurt? A. I didn't notice any lights at all."

He fell down the shaft of the baggage elevator to the right of the rear of the room. The evidence in some particulars was conflicting, especially as to the amount of the light in the baggage room; but it is ample to sustain a finding by the jury of the evidentiary facts we have indicated.

The claim of the defendant, briefly stated, is to the effect that the plaintiff, under the circumstances disclosed by the evidence, was, if not a trespasser, a bare licensee, who must be held to have accepted the premises as they were, and assumed the risks incident to their unauthorized use. It is quite obvious from the evidence that the plaintiff was in the baggage room for the purpose of making delivery of the packages upon the implied invitation of the defendant, and that while in the baggage room he was neither a trespasser nor a bare licensee; hence the defendant owed him the duty of exercising ordinary care in keeping the premises in a reasonably safe condition. Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492; Hyatt v. Murray, 101 Minn. 507, 112 N. W. 881.

Counsel for defendant seems to concede this proposition, but claims that, when the plaintiff attempted to go from the baggage

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room to the clerk's desk in the lobby, the relationship of the parties changed, and the plaintiff then, at most, became a bare licensee, and assumed all the risks as a matter of law. It is quite evident that he fell from the baggage room itself through the open door into the shaft. But, this aside, it was a fair question for the determination of the jury whether the plaintiff, in attempting to go from the baggage room to the office of the hotel to obtain the receipt, which was a part of his duty in order to complete the delivery, was acting within the scope of his implied invitation to enter the building. We are of the opinion that whether he was a mere licensee, or acting within the scope of the implied invitation, and whether the defendant was negligent in the premises, were clearly questions to be decided by the jury, and not by the judge as a matter of law.

It is not so clear whether or not the plaintiff was, upon the undisputed evidence, guilty of contributory negligence as a matter of law. The defendant claims that the evidence is conclusive that he was so guilty, and that it was entitled to an instructed verdict in its favor. We are of the opinion, based upon a consideration of the whole evidence, that this question was also one to be decided by the jury under proper instructions, which were given.

Judgment affirmed.

JAGGARD, J., took no part.

BROWN, J. (dissenting).

Plaintiff was wholly unfamiliar with the baggage room. It was dimly lighted, and in groping around therein in search of a passageway to the hotel office, there being no necessity for so doing, plaintiff, in my opinion, assumed the risk of pitfalls and dangers, and was guilty of contributory negligence as a matter of law.

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JOHN D. BARRETT and Another v. FREDERICK E. PERKINS and Another.[1]

February 17, 1911.

Nos. 16,872, 16,873—(238, 239).

Deficiency in area of plat — shortage falls on irregular parcel.

Where a definite tract of land is platted and subdivided into lots of regular and specified dimensions, leaving at the end a remnant or irregular tract not sufficient from which to form a lot of the character of those laid out, and the plat indicates the size of all lots, including the irregular tract, and it subsequently appears that there is a deficiency of land to accord to each of the regular lots the dimension indicated by the plat if the irregular tract retains the area given to it, thus disclosing a clear mistake on the part of the person platting the land, the deficiency must fall upon the irregular tract, and not upon the regular and uniform lots. The same rule would apply in the case of an excess of land.

Action in the district court for Ramsey county to determine the boundary line between lot 17, owned by defendant Minnesota Pharmaceutical Manufacturing Company, and lot 18, owned by plaintiffs, and between lot 19, owned by plaintiffs, and lot 20, owned by defendant Frederick E. Perkins. The answer of defendant manufacturing company alleged, among other matters, that at the time of the platting of the land it was at first intended to embrace in one lot the irregular tract of land, lying southwesterly of the alley through said addition, which remained after surveying and laying out lots 1 to 20 inclusive, which irregular tract of land is the land included in lots 21 and 22 in the plat; that said plat was first made with that intention, and the distance along the southwesterly line of that portion of the plat was noted thereon as being 75.38 feet, but before said plat was completed it was decided to divide that irregular portion into two lots, numbering the same 21 and 22, respectively, making the width of lot 21 twenty-five feet, and that width of twen-

[1]Reported in 130 N. W. 67.

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ty-five feet was noted upon the plat, but that the parties making the plat neglected to change the length of the southwesterly line of lot 22 by deducting therefrom the twenty-five feet included in lot 21, and allowed the length of the southwesterly line of lot 22 to appear as 75.38 feet instead of 50.38 feet. For a second defense the answer alleged adverse possession by defendant and its grantors since the year 1882. The defendant Perkins also filed an answer.

The case was tried before Kelly, J., who made findings of fact, and as conclusions of law found that the true boundary line between lots 17 and 18 was at a point on the northerly line of University avenue 175.38 feet westerly from the southeasterly corner of lot 22, and that the boundary line extended northerly to the rear of said lots at right angles to the center line of University avenue; that the true boundary line between lots 19 and 20 was at a point on the northerly line of University avenue 125.38 feet westerly of the southeasterly corner of lot 22, and the boundary line extended northerly to the rear of said lots at right angles to the center line of University avenue; and that the southeasterly corner of said lot 22 was at a point forty feet west of the north and south center line of section 33, township 29, range 23.

From an order denying plaintiffs' motion for a new trial, they appealed. From an order denying defendant manufacturing company's motion for a new trial, it appealed.

Charles Bechhoefer and *Edward P. Sanborn,* for appellants Barrett & Zimmerman.

Edward Lucas and *Charles G. Laybourn,* for appellant Minnesota Pharmaceutical Manufacturing Company.

Taylor & Harris and *John D. O'Brien,* for respondent.

BROWN, J.

Action to determine the boundary line between certain lots in Hughes' addition to the city of St. Paul. Defendant Perkins had judgment, and plaintiffs Barrett & Zimmerman and defendant Minnesota Pharmaceutical Manufacturing Company appealed from an order denying a new trial.

The facts are as follows: Hughes' addition is a replatting of a

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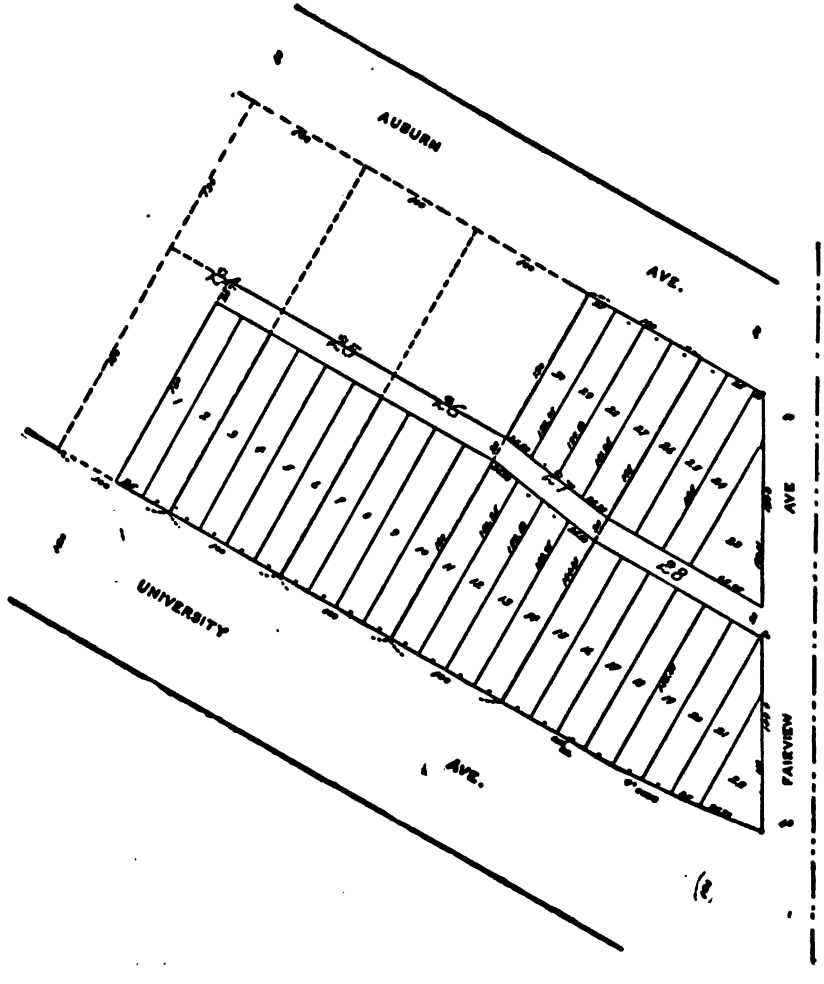
part of lots 24, 25, and 26, and all of lots 27 and 28, of Merriam's Outlots, as shown by the recorded plat. Only that part of Hughes' addition comprising lots 1 to 22, inclusive, is involved in the present action. To assist in understanding the controversy we here insert a copy of the original Hughes plat:



This is to certify that Curtis A. Hughes & Marietta E. Hughes, his wife, owners of the following described property, viz:—Beginning at the southeast corner of

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lot Twenty-Four (24) of Merriam's Outlots, thence northeasterly on the line which divides lots Twenty-Four (24) and Twenty-Five (25) of said Merriam Outlots one hundred & eighty (180) feet; thence, northwesterly on a line parallel to southwesterly line of said lot Twenty-Four (24) fifty (50) feet; thence, southwesterly on a line parallel with southeasterly line of said lot Twenty-Four (24) one hundred & eighty (180) feet; thence, southeasterly on southwesterly line of said lot Twenty-Four (24), fifty (50) feet to a point of commencement; also, the southwesterly one hundred & eighty (180) feet of lots Twenty-Five (25) & Twenty-Six (26) and all of lots Twenty-Seven (27) and Twenty-Eight (28) of Merriam's Outlots—have caused the same to be subdivided & platted & hereafter known as "Hughes Midway Addition to the City of St. Paul, Ramsey Co., Minn." as shown by this map—& we do hereby give and dedicate to the public and for the public use forever the alley as shown to run through said property as this map indicates. Witness our hands & seals this thirtieth day of April, A. D. 1880.

Marietta E. Hughes. [Seal.]
Curtis A. Hughes. [Seal.]

In presence of Harvey George. Clarence H. George.

The larger figures 24, 25, 26, 27, and 28 indicate the Merriam Outlots, and the smaller figures, 1 to 22, inclusive, the Hughes lots here involved. The action was brought to determine the boundary between lots 18 and 19, but in fact involves the boundary between all the lots in this part of the plat. All the lots, except 22, have, according to the plat, a frontage of twenty-five feet on University avenue, and lot 22 a frontage of 75.38 feet. The distance between the outer boundary of lot 1 and Fairview avenue, the end of the plat, is insufficient to supply the number of lots given on the plat with the dimensions stated. So that beyond question there was a mistake in the preparation of the plat, or in the original survey, and the purpose of the action is to locate and correct it. The whole controversy in the court below narrowed down to the question whether lot 22 was or was not erroneously designated on the plat as a seventy-five-foot lot. The trial court in effect found that this lot was entitled to a frontage of 75.38 feet; and, if that conclusion be sustained by the evidence and the rules of law controlling the question, the case is at an end.

We are of the opinion that the learned trial court erred in the conclusion stated. The evidence is insufficient to sustain it. The court relied, in reaching its conclusion, chiefly upon the testimony

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of witness Armstrong, county surveyor of Ramsey county. This witness, though apparently fair and candid, seems to have fallen into the initial error of adopting as correct the notation on the plat that lot 22 had a frontage of 75.38 feet on University avenue. Adopting that as a basis, he located a stake precisely that distance from the intersection of Fairview and University avenues, which he assumed was placed there by the original surveyor as the dividing line between lots 21 and 22. He confirms his view of the matter by surveys from the standpoint of other known and ascertained objects; but he did not locate or make any of his surveys or calculations from the point indicated by the plat as the commencement of the addition, namely, the southeast corner of lot 24 of Merriam's Outlots. And we are impressed that his testimony on the trial was founded entirely upon the assumption that lot 22 was of the dimensions indicated by the plat.

But, conceding for present purposes the correctness of the conclusion reached by the witness, his evidence served only to demonstrate the fact, concurred in by all the parties, that there was a mistake somewhere in the plat. There is not enough land within the platted tract to supply all the lots of the dimensions given on the plat, and this situation is not controverted. Giving to lot 22 a frontage of 75.38 feet results in moving each of the other lots twenty-five feet west, and in the end to completely extinguish or eliminate lot 1. In other words, there is a deficiency of land, and all the lots cannot be accounted for. In such a case the most the court is authorized to do, in the form of correcting the apparent mistake, is to apportion the deficiency among the several lots, and not eliminate one of them entirely, as the trial court in effect did in the case at bar.

The owner of lot 1 has as much, and it would seem a greater, right to have his property remain a part of the plat, as the owner of lot 22; the greater right, because lot 1 was first laid out by the owner of the plat, and beyond controversy, with the intention that it should be and remain a lot of the subdivision of the dimension indicated. The rule requiring an apportionment of either an excess or deficiency of land in such cases is well settled. Martz v. Williams, 67 Ill. 306; Miller v. Topeka, 44 Kan. 354, 24 Pac. 420; Lincoln

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v. Edgecomb, 28 Me. 275; Quinnin v. Reimers, 46 Mich. 605, 10 N. W. 35; Porter v. Gaines, 151 Mo. 560, 52 S. W. 376; Pereles v. Magoon, 78 Wis. 27, 46 N. W. 1047, 23 Am. St. 389. The trial court was therefore in error, even from the standpoint of the testimony of witness Armstrong, in reaching the conclusion, in substance and effect, that lot 22 was entitled to remain with a frontage of 75.38 feet.

However, we are not to be understood as holding that the rule stated should have been applied to the facts in the case at bar. The rule applies more particularly to tracts of land subdivided into smaller tracts of specified and uniform dimensions, and not to a situation like that here presented. Here the owner of a definite tract of land intended, and his intention is manifest, to lay out as many lots of the uniform width of twenty-five feet as the tract would contain. This he proceeded to do, laying off twenty-one twenty-five-foot lots, after which there remained an irregular or triangular piece to be disposed of as a remnant. This he supposed was 75.38 feet at its base, and so noted it upon the plat. This, we are satisfied from the record, was a clear mistake. But it is not necessary to extend the opinion by a discussion of the matter. It is not important.

There is a deficiency of land to make up the number of lots with indicated frontage, and the rule in such a case is that the deficiency must fall upon the last or irregular tract; the remnant of the whole after laying out the lots of a uniform size. Baldwin v. Shannon, 43 N. J. L. 596. In a situation like that the owner of the plat must be deemed to have intended to constitute the irregular remnant a lot by itself, regardless of its dimensions, and a purchaser thereof takes the whole remnant, whether of greater or less area than that indicated by the plat. It cannot be enlarged at the expense of the owners of other lots, nor, if of greater area than shown by the plat, diminished in their favor. Though the rule might in a given case work a hardship to the owner of the remnant lot, yet in the case at bar the combined injury to the owners of the other lots, arising, if defendant be sustained, from the displacement of their improvements and the total elimination of the owner of lot 1, far outweigh any disclosed damage or hardship to defendant. The rule furnishes

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a definite and safe method and guide for the determination of mistakes of this nature, and we adopt and apply it to the facts in the case at bar; and if on a new trial the fact remains the same the relief stated should be granted.

Order reversed, and a new trial granted.

JAGGARD, J., took no part.

JOHNSON-VAN SANT COMPANY v. MARTIN MARTENS.[1]

February 17, 1911.

Nos. 16,889—(196).

Cancellation of contract — fraud — evidence.

The evidence in this, an action to cancel and annul an executory contract claimed to have been procured by fraud, sustains the findings of the trial court.

Action in the district court for Hennepin county to rescind a certain contract and discharge the same of record; that defendant be perpetually enjoined from bringing suit thereon against plaintiff, either for specific performance or otherwise, either in the courts of Minnesota or North Dakota, and that defendant account to and reimburse plaintiff for the expenditures made and incurred, and damages suffered, in the sum of $10,450. The facts are briefly stated in the opinion. The answer admitted the execution of the contract, but denied that E. P. Raymond acted as defendant's agent. The case was tried before Dickinson, J., who made findings of fact and as conclusion of law ordered that the contract be cancelled. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

A. B. Jackson and *J. W. Gilger,* for appellant.

H. E. Fryberger and *Robert Jamison,* for respondent.

[1]Reported in 129 N. W. 859.

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SIMPSON, J.

The plaintiff owned two farms in North Dakota, and one of the officers of plaintiff owned three other farms in that state. The defendant owned nine hundred acres of land in Mississippi, twelve hundred eighty acres of land in Dunn county, North Dakota, and a mortgage on a half section of land in Monona county, Iowa. September 9, 1909, plaintiff and defendant entered into a written contract for the exchange of properties, the five farms owned by plaintiff and its officer for the said lands and mortgage of the defendant. Before conveyances were made pursuant to the contract, the plaintiff notified the defendant that it would not carry out the contract, and brought this action to cancel and annul the same. The claim of the plaintiff is that it was induced to enter into the contract by false and fraudulent representations made by and on behalf of the defendant concerning the character and value of defendant's said properties, and that the actual aggregate value of the defendant's properties is greatly less than if said properties were as represented, and greatly less than the aggregate value of the said properties by plaintiff agreed to be exchanged therefor, and that a false and fraudulent representation was also made as to the title of the defendant to the Mississippi land. The trial of the case lasted several weeks. The testimony heard, as printed and returned to this court, covers approximately fifteen hundred pages.

The trial court, in detailed findings, found the facts substantially as claimed by the plaintiff, as stated, except as to the fraudulent representations of title to the Mississippi land, and ordered judgment canceling and annulling the contract, and for additional minor relief. From an order denying a new trial, made after refusal to modify the findings as requested by the defendant and to grant the defendant's motion for judgment, the defendant appealed, and by numerous assignments of error questions the sufficiency of the evidence to sustain each of the findings going to the fraud in the making of the contract.

The evidence bearing on each of these findings is conflicting. As to two questions, whether plaintiff entered into the contract through or in reliance on the representations made by Raymond, and whether

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Raymond was defendant's authorized agent in carrying on the negotiations with plaintiff, the evidence submitted by the plaintiff, is far from conclusive, and the evidence relied on by the defendant tends strongly to establish a negative answer. But by the record a case is not made of the absence of evidence to sustain the findings on these questions, nor of a clear preponderance of evidence opposed to the findings. On these two questions, as well as the others involved, there is, in the record, much evidence tending directly to sustain the conclusion arrived at by the trial court. Finding the facts under the evidence involved weighing the testimony of the different witnesses, and, in case of conflict, determining what testimony was true. In such case, unless the finding appears to be against a clear preponderance of the testimony, it will not be disturbed on appeal. We have carefully examined the entire record, in connection with the briefs and arguments of counsel, and conclude that the findings of the trial court are sustained by the evidence. Having so concluded, it is not the province of this court to prove or demonstrate, by a discussion of the evidence returned on appeal, the correctness of the findings made by the trial judge. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757. To do so in this case would serve no useful purpose.

As to the claim that fraudulent representations were made concerning defendant's title to the Mississippi land, it is not supported by the findings. Representations were made that the defendant had good title to such land. All the evidence tends to show that the title of defendant was good under the law of the state of Mississippi. The local law determines whether the title to land is good. By the contract in question, however, the defendant agreed to convey this land "by a good and sufficient warranty deed and an abstract showing good and merchantable title, free and clear of all incumbrance whatsoever." By this language the parties evidently intended that the title conveyed should be a good title shown by the records of titles. The trial court found that the defendant did not have a good record title. But, the court having determined that the contract is invalid because procured through defendant's fraud, the effect on a valid contract of the inability of the vendor to furnish the title contracted to

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be furnished could not have been determined by the court below, and it is not here involved.

The errors assigned in the admission of evidence, so far as urged in the printed brief, are based on the claimed insufficiency of other evidence to sustain certain of the findings of the trial court, and are disposed of by the holding that such findings are sustained by the evidence.

Affirmed.

JAGGARD, J., took no part.

W. E. CAWLEY v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 17, 1911.

Nos. 16,931—(217).

Injury at street crossing — questions for jury.

The plaintiff was injured in a public street at a railroad crossing by the alleged negligence of the defendant in operating its trains over the crossing. *Held*, that the questions of the defendant's negligence and the contributory negligence of the plaintiff were made by the evidence questions of fact, and were properly submitted to the jury.

Action in the district court for Hennepin county to recover $51,000 for personal injuries. The facts are stated in the opinion. The case was tried before Simpson, J., who denied defendant's motion for a directed verdict. The jury returned a verdict in favor of plaintiff for $10,462.24. Defendant's motion for judgment in its

[1] Reported in 129 N. W. 842.

[Note] Violation of ordinance as to safety gates or flagman at railroad crossing as ground for private action, see note in 5 L.R.A.(N.S.) 246; and 5 L.R.A.(N.S.) 245.

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favor notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Brown, Albert & Guesmer, for appellant.

Daniel F. Carmichiel, for respondent.

START, C. J.

On October 15, 1909, at the hour of 8:40 p. m., the plaintiff, while he was upon Harrison street, in the city of Minneapolis, and in the act of crossing the railway tracks of the defendant, which passed over and across the street, was struck and injured by box cars which were being moved across the street. As a result of the accident he lost both of his legs, his left hand and arm were crippled, and he was otherwise seriously injured. He brought this action in the district court of the county of Hennepin to recover damages from the defendant on account of his injuries, on the alleged ground that the cars were negligently moved across the street without giving any signal or warning of any kind, without any employee or light on the cars to warn persons about to cross the tracks, without lowering gates, and at an excessive rate of speed. The answer was, in effect, a general denial; but the question of the plaintiff's contributory negligence was litigated and submitted to the jury without objection. A verdict was returned for the plaintiff in the sum of $10,462.24, and the defendant moved for judgment in its favor notwithstanding the verdict, which was denied, and judgment entered, from which the defendant appealed.

The defendant does not in any event seek a new trial, nor complain of any error in the rulings or instructions of the trial court, except that it erred in denying defendant's motion for a directed verdict in its favor. The sole question, then, for our decision, is whether the record conclusively shows as a matter of law that the plaintiff was not entitled to recover. That the plaintiff was struck and injured by the cars of some railway company at the time and place stated and upon the tracks of the defendant is not controverted; but whether he was struck by the cars of the defendant, as the complaint alleged, or whether, if so, the defendant was negligent, and whether the plaintiff was guilty of contributory negli-

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gence, were questions which were litigated, submitted to the jury, and determined against the defendant. If any one of these questions was made, by the evidence, one for the decision of the trial judge as a matter of law, then it was error to deny the motion of the defendant for an instructed verdict in its favor; otherwise, not.

We have attentively considered the record, which consists of more than twelve hundred printed pages, for the purpose of determining these questions. It is not our purpose to discuss or refer to the evidence in detail, as it will serve no practical purpose, but simply to indicate the result of our consideration of the evidence.

While the accident occurred on the tracks of the defendant, yet the evidence is conclusive that three other railroad companies also operated trains over the defendant's tracks. Nevertheless the complaint charged that it was the defendant's cars operated by it which injured the plaintiff and all questions of the liability of the defendant, if the plaintiff was injured by the cars of some of the other railroad companies, were thereby eliminated from the case. The burden by the pleadings was on the plaintiff to show that he was struck by the defendant's cars, and the defendant insists that there was no evidence to sustain a finding by the jury that such was the fact. The evidence on the part of the plaintiff, direct and circumstantial, tends to show that it was the defendant's train which was backing across the street when the plaintiff was struck. On the part of the defendant there was evidence tending to show the movements of all of the defendant's trains which passed over the crossing or in its vicinity within an hour before or after the plaintiff was injured. It is claimed that such evidence was conclusive that no movement of any of its trains within the time corresponded with the movement of the train which struck the plaintiff as described by him, and that the train which struck him could not have been the defendant's. The conclusion to be drawn from the whole evidence relevant to this question was, in our opinion, for the jury, and not for the judge. The question of the identity of the train was clearly one of fact for the jury, and their attention was impartially called to the evidence and claims of the respective parties. We hold that

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the evidence was sufficient to justify such submission and that it sustains the finding of the jury thereon.

The defendant further urges that there was no evidence to show any negligence in the operation of the train. Counsel in this connection claims that the failure to sound the whistle at this crossing was customary and whistling was prohibited by ordinance. The court charged the jury that such failure could not be made the basis of negligence, and also that the plaintiff, in regulating his conduct, could not rely upon the fact that the gates were up, because he testified that he knew that they were not being operated. The jury were, however, instructed that it was the duty of the defendant to maintain and operate the gates at the crossing. It is urged in this connection that the ordinance imposing such duty is invalid, and that in no event was a failure to operate the gates negligence as to the plaintiff; also that there was no evidence as to the rate of speed the cars were going. These matters are here immaterial, if at the close of the evidence, when the directed verdict was requested, there was sufficient evidence to take the case to the jury on any of the grounds of negligence alleged in the complaint.

No errors in the charge of the court are here assigned, except its denial of the motion for an instructed verdict. We find the evidence sufficient to take the question of the defendant's negligence to the jury.

The last reason urged why the court should have instructed a verdict for the defendant is that it conclusively appears from the evidence that the plaintiff was guilty of contributory negligence. Such a question is one for the court only in clear and exceptional cases, where only one conclusion can be reasonably drawn from the undisputed evidence or admitted facts. This is not such a case, for the evidence is such that fair-minded men might well draw therefrom different conclusions as to the plaintiff's alleged negligence.

Judgment affirmed.

JAGGARD and SIMPSON, JJ., took no part.

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NATIONAL CITIZENS BANK OF MANKATO v. M. E. BABCOCK and Others.[1]

February 17, 1911.

Nos. 16,962—(253).

Evidence sufficient to support finding.

The evidence was sufficient to warrant a finding that appellant, Hoerr, agreed to credit a stipulated amount on certain mortgage notes, in consideration of the relinquishment of all interest in a timber contract which had been assigned to him by defendant Babcock.

Statute of frauds.

Such agreement was not the purchase of an interest in real estate, and for that reason void under the statute of frauds.

Action in the district court for Steele county against M. E. Babcock and his wife, Daniel T. Bowen and William G. Hoerr, to determine the indebtedness of defendants Babcock and Bowen to plaintiff bank, the priority of liens upon certain premises in Aitkin county and the amount due on each, and that, subject to all such liens prior to that of plaintiff's, the premises be sold at mortgage foreclosure sale under direction of court; that plaintiff be allowed to redeem the premises from the lien of the mortgage executed by defendants Babcock to the Hill City Land, Loan & Lumber Company; that defendants and all persons claiming under them be forever barred of all right, title or interest in and to the premises, save only the right of redemption provided by law. The defendants Babcock did not appear. The separate answer of defendant Hoerr alleged that he was assignee of the mortgage described above and there was due him the sum of $3,400 thereon, and that the mortgage of $200 with interest was still unpaid. The reply was a general denial. The facts are stated in the opinion.

The case was tried before Buckham, J., who made findings of fact and as conclusion of law found that the note in suit was the joint

[1]Reported in 129 N. W. 1045.

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and several note of defendants M. E. Babcock and Daniel T. Bowen; that the deed from Babcock to Bowen operated to secure Bowen as a surety on the note signed by him; that by his deed to the bank he duly assigned such equitable mortgage to the bank which held it as security for the payment of the note; that the sum of $200 was due upon the mortgage from defendants Babcock to Hoerr, and $2,450 upon the mortgage to the Hill City Land, Loan & Lumber Company; that plaintiff was entitled to foreclosure of its mortgage, subject to the prior lien of the Hill City mortgage. From the judgment entered pursuant to the findings, defendant Hoerr appealed. Affirmed.

H. L. & J. W. Schmitt, for appellant.

S. B. Wilson, for respondent.

Lewis, J.

Action for an accounting, to determine the amount of debt, to foreclose the mortgage given as security, to have prior liens determined, and for leave to redeem from a prior mortgage. The court found that on the twenty-sixth of January, 1905, Babcock executed and delivered to plaintiff his promissory note for $2,000, due in six months; that Bowen signed the note as surety, and in order to secure him for so doing Babcock conveyed to him by warranty deed certain real estate in Aitkin county, subject to a mortgage of $3,450 to the Hill City Land, Loan & Lumber Company; that, after deeding the land to Bowen, Babcock entered into a contract with Monks & McKinley, of date December 16, 1905, for the cutting, removal, and sale of the timber thereon; that on the twelfth of January, 1906, the Hill City Land, Loan & Lumber Company assigned its mortgage to defendant Hoerr, and at the same time Babcock assigned to him the timber contract, and also executed and delivered to Hoerr a mortgage of $200 on the same land. This arrangement was entered into between Babcock and Hoerr for the purpose of having the cedar cut and the proceeds applied on the mortgage. Hoerr then consented to the cutting and sale of the timber. It was cut and sold, the proceeds paid to Hoerr, Bowen conveyed the land to plaintiff, this action was commenced, and all the issues were found in favor of plaintiff.

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Hoerr alone appealed, and the only question in the case is whether there is sufficient evidence to support the following finding of fact: "That after a considerable amount of timber had been cut and removed under the contract between the defendant Babcock and said Monks & McKinley, the defendant Babcock sold to the defendant Hoerr all his interest in such contract and in the timber cut thereunder for the sum of $1,225, which was to be applied as follows: $225 on the interest then due on the mortgage purchased by said Hoerr, and $1,000 for the surrender and cancellation of the $1,000 note first due on such mortgage—but that defendant Hoerr has at all times refused to make such application or to surrender such note." If the evidence warranted the court in finding that Hoerr agreed to settle with Babcock for $1,225, and credit the Hill City mortgage with that amount, then plaintiff was entitled to have the credit applied as of the proper date.

The evidence was conflicting. Mr. Hoerr testified that Monks & McKinley borrowed money from the bank to pay the expenses of carrying out the contract, and that all the proceeds from the timber were absorbed to pay expenses; that he received no money to apply on the mortgage. He admitted that Babcock made him a proposition to pay $1,225 on the Hill City mortgage and take all the proceeds from the timber contract; but he denied that he ever accepted it, although he took the matter under consideration. There were certain admissions, however, which indicated that he had agreed to it. That amount, $1,225, was claimed by plaintiff and by Babcock to be the amount to be credited. If Mr. Hoerr never expressly accepted the offer, he did not expressly refuse it. Babcock dropped out, and Hoerr assumed complete control, but never rendered any account, and required no accounting from Monks & McKinley. Acceptance of a proposition by conduct may be as effective as by a formal declaration.

This agreement was merely the transfer, by Babcock to Hoerr, of his interest in the contract, and was not the purchase of an interest in real estate, and void under the statute of frauds.

Affirmed.

JAGGARD, J., took no part.

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RAHDERS, MERRITT & HAGLER v. PEOPLE'S BANK OF MINNEAPOLIS and Others.[1]

February 17, 1911.

Nos. 16,964—(257).

Insurable interest in life of partner.

A copartnership has an insurable interest in the life of one of the partners.

Insurable interest in life of stockholder.

Whether a corporation has an insurable interest in the life of a stockholder is not decided. But an insurance contract, which has been issued and carried in good faith upon the life of a member of a copartnership, may be assigned by the copartnership to the corporation organized for the purpose of succeeding to the business.

Parol assignment of policy.

An assignment by the beneficiary of a life insurance policy may be made by parol; no objection being interposed by the insurer.

Action in the district court for Hennepin county by plaintiff corporation against defendant bank and the administrators of H. G. Merritt, deceased, to recover from defendant bank the sum of $5,000, proceeds of two insurance policies on the life of decedent, deposited therein by the insurance company. The facts are stated in the opinion. The answer admitted that the business of the corporation of Rahders, Merritt & Hagler succeeded to all the assets and liabilities of the copartnership of that name; that the corporation continued to conduct the affairs of the copartnership; denied that at any time the lives of the several members of the partnership were insured for the benefit of the partnership, but alleged that on or about the time mentioned in the complaint there were issued two policies of insurance for $2,500 each upon the life of H. G. Merritt,

[1]Reported in 130 N. W. 16.

[Note] Insurance on life of officer of corporation for benefit of corporation, see note in 16 L.R.A.(N.S.) 1020.

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payable to his estate. The bank did not answer. The case was tried before Dickinson, J., who made findings of fact, and as conclusion of law found that plaintiff was the owner of the $5,000 paid to defendant bank, and that defendant administrators had no right, title or interest in the fund; that plaintiff was entitled to judgment. From an order denying defendants' motion for a new trial, the administrators appealed. Affirmed.

G. A. Will, for appellants.

Keith, Evans, Thompson & Fairchild, for respondent.

LEWIS, J.

From 1890 until 1907, Rahders, Merritt & Hagler were copartners in business in North Dakota, under the name Rahders, Merritt & Hagler. In 1907 a corporation was formed with the same name. Each former partner became the owner of one-third of the capital stock, and the business of the copartnership was transferred to the corporation, which acquired all of the assets and assumed all of the liabilities. In 1900 Merritt took out $5,000 insurance on his life, payable to his estate, and delivered the policies to the copartnership, and after the corporation was formed they were scheduled among the assets and turned over to the corporation. The premiums were all paid by the copartnership until the corporation was formed, and then one premium was paid by the company. By the agreement of the parties the money due on the policies was paid by the insurance company to the People's Bank, and this action was brought to secure judgment in favor of the corporation.

The trial court found that, while said partnership was conducting said business, the lives of the several members were insured by said copartnership for the benefit of said firm in the sum of $5,000 on the life of each partner; that all of the premiums on the policies taken out on the lives of the members were paid by said partnership as an expense of its business, and that the policies so taken out were delivered to and kept in the possession of said partnership; that the policies taken out by Mr. Merritt by inadvertence were not transferred or formally assigned to said partnership or to said corporation, but that the same were at all times the property of said co-

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partnership until the organization of said corporation, and thereafter were the property of said corporation, and were at all times recognized by said Merritt as part of the assets of said copartnership, and of said corporation after its organization, and were listed and included by said Merritt in the statement of assets of said copartnership which were transferred to said corporation upon its taking over the business and assets of said copartnership—and ordered judgment for the corporation.

The administrators of the estate appealed, but do not question the findings of fact. They claim the right to recover upon the following propositions of law: First, that there was no insurable interest in the two other members of the copartnership at the time the policies were issued; second, if there was an insurable interest, then it became extinguished on the formation of the corporation; and, third, any assignment or change in the beneficiary by parol would be an unauthorized alteration of the contract of insurance.

1. The question of insurable interest is fully discussed in Bacon, Life Insurance, §§ 248, 250, where the leading authorities are collected. Any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazards of a life in which the insured has no interest. Conn. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Loomis v. Eagle, 6 Gray (Mass.) 396. It does not require a very great interest to take a case out of the objection of being a wager policy. Each member of a copartnership certainly has an interest in the continuance of the lives of his copartners, growing out of the partnership relation. The necessities of the business incur more or less liability, which might be serious financially if one were removed by death. Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. ed. 800. This is the general rule, and we hold that the partnership in question had an insurable interest in the life of Mr. Merritt.

2. Among the assets turned over by the copartnership to the corporation, upon its formation in 1907, were the Merritt insurance policies, and two other policies held by the partnership upon the lives

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of the other two members. The three members of the copartnership were the charter members of the corporation, and the capital stock of $50,000 was divided equally among them, and so remained to the time of Mr. Merritt's death, at which time the corporation had paid one premium. The court found that the policies were issued for the benefit of the copartnership, and that the corporation when formed became the beneficiary. This is equivalent to finding that the contract of insurance was transferred, although there was no formal assignment of the policies. This finding was not attacked by the appellant; but it is denied that the corporation could legally become the beneficiary, because it had no insurable interest in the life of its stockholder, Mr. Merritt.

There is a great diversity of opinion on this question. In some jurisdictions it has been squarely held that a policy, though valid in its inception, is void in the hands of an assignee having no insurable interest in the life of the insured. Tate v. Commercial, 97 Va. 74, 33 S. E. 382, 45 L.R.A. 243, 75 Am. St. 770; Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. 107; Metropolitan v. Elison, 72 Kan. 199, 82 Pac. 410, 3 L.R.A.(N.S.) 934, 115 Am. St. 189; Bendet v. Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L.R.A. (N.S.) 114, 127 Am. St. 1000.

The weight of authority, however, supports the rule that a policy, valid when issued, may be assigned as a chose in action to one having no insurable interest in the insured. Dixon v. National, 168 Mass. 48, 46 N. E. 430; Prudential v. Liersch, 122 Mich. 436, 81 N. W. 258; Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L.R.A. 417, 70 Am. St. 424; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L.R.A. 844. The reasoning in support of this line of decisions is that the insured ought to be permitted to realize at any time on the value of his policy; that it is a species of property, and the value of life insurance as an asset would unnecessarily be lost, if not made assignable as other choses in action. Of course, good faith in the transaction is required, and the courts do not hesitate to condemn a policy issued for the purpose of having it assigned. See valuable note to Metropolitan v. Elison (Kan.) 3 L.R.A.(N.S.) 934. Our own court, in Brown v. Equitable L. A. S., 75 Minn. 412,

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78 N. W. 103, 671, 79 N. W. 968, decided that a policy, valid when issued, was valid in the hands of a bank which had loaned money on it to the assignee of the insured.

The courts are not unanimous on the question whether a corporation has an insurable interest in its stockholders. An interesting discussion of this subject is found in Mechanicks v. Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. 650. But that question is not directly involved here, and it is unnecessary to determine whether this corporation might have taken out a policy on the life of Mr. Merritt. These policies were issued in good faith to the copartnership, and acquired in good faith by the corporation, and on authority and on principle that company is entitled to collect the amount of the policies as assignee.

3. It only remains to notice appellant's third point, that the assignment, if made, was by parol, and contrary to the terms of the written contract. There are three answers to this objection: First, the writing—that is, the policies—do not forbid an assignment of the contract, and do not provide in what manner an assignment shall be made; second, the court found that the policies became the property of the corporation, and appellant does not question the fact; and, third, the insurance company admits its liability on the policies, and makes no objection to the method of the transfer or assignment, and as between the assignor and assignee an assignment by parol was sufficient. Hogue v. Minnesota Packing & Prov. Co., 59 Minn. 39, 60 N. W. 812.

Affirmed.

JAGGARD, J., took no part.

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PETER KERLING v. G. W. VAN DUSEN & COMPANY.[1]

February 17, 1911.

Nos. 16,970—(265).

Reduction of verdict sustained — evidence.

Action for death of plaintiff's intestate, a son seventeen years old. Verdict for $5,000, which the trial court reduced to $3,000. *Held*, that there was no abuse of discretion in reducing the verdict, instead of granting a new trial, and that, as reduced, the award of damages is sustained by the evidence.

Action in the district court for Yellow Medicine county by the administrator of the estate of Andrew Kerling, deceased, to recover $5,000 for the death of his intestate. After the second appeal, 109 Minn. 481, 124 N. W. 235, 372, the case was tried before Powers, J., and a jury which returned a verdict in favor of plaintiff for $5,000. Defendant's motion for judgment notwithstanding the verdict was denied, and a new trial was granted unless plaintiff consented to a reduction of the verdict to $3,000. From the order granting a new trial, it appealed. Affirmed.

Morton Barrows, for appellant.

Thomas E. Davis, Ernest A. Michel and *John I. Davis,* for respondent.

START, C. J.

The plaintiff's intestate was his son, who was seventeen years old at the time of his death. This action was brought in the district court of the county of Yellow Medicine to recover damages for his death, which the complaint alleged was caused by the defendant's negligence. The facts of the case fully appear in the opinion of the court on the first appeal, which was from an order denying defendant's motion for judgment or a new trial after verdict of $1,200 for plaintiff. The order was reversed, and a new trial granted. See

[1] Reported in 129 N. W. 1042.

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108 Minn. 51, 121 N. W. 227. The second trial resulted in a verdict of $4,500 for the plaintiff, and defendant again appealed. A new trial was granted. 109 Minn. 481, 124 N. W. 235, 372. On the third trial a verdict of $5,000 was returned. The defendant made a motion for judgment notwithstanding the verdict or a new trial. The trial court made its order denying the motion for judgment, but granting a new trial unless the plaintiff consented to a reduction of the verdict to $3,000, but, if he did, the motion should stand denied. He so consented, and the defendant appealed from the order.

Nearly all of the assignments of error are directed to the rulings of the trial court as to admission of evidence and to its charge and refusal to charge. Many of the questions so raised were disposed of adversely to the defendant on the former appeals, and have become the law of the case. We have considered all of the others on their merits, and find no reversible errors in the rulings of the court or in its instructions.

The evidence sustained the verdict, except as to the damages awarded. They were excessive, but were reduced by the court and consent of the plaintiff. It is, however, urged that the damages were so excessive as to indicate that the jury were influenced by passion and prejudice in the consideration of other material issues; hence a new trial, and not a reduction of the verdict, should have been ordered. This was a matter resting largely in the sound judicial discretion of the trial court, and its action will not be reversed except for an abuse of discretion. Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L.R.A.(N.S.) 439, 111 Am. St. 462; Goss v. Goss, 102 Minn. 346, 113 N. W. 690. In view of the history of this case, we are of the opinion that the trial court did not abuse its discretion.

The defendant further urges that the damages, as reduced, are excessive, and that the evidence is not sufficient to sustain a verdict for $3,000. The award of damages, as reduced, is liberal; but it is supported by the evidence within the rule applicable to such cases. O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289, 45 N. W. 440; Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106;

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McVeigh v. Minneapolis & R. R. Ry. Co., supra, page 450, 129 N. W. 852.

Order affirmed.

JAGGARD, J., took no part.

STATE v. CLAUDE FRANCIS YODER.[1]

February 17, 1911.

Nos. 16,992—(260).

Void marriage.

A marriage contract is a nullity ab initio only where expressly so declared by statute. In such a case it is absolutely void, requiring no judicial decree for its dissolution.

Voidable marriage.

A voidable marriage contract arises where, though prohibited by law, it may be ratified or confirmed by the subsequent cohabitation and conduct of the parties, and is valid until dissolved by judicial decree.

Bigamy.

A voidable marriage is sufficient upon which to base a prosecution for bigamy, and the fact that the contract is voidable constitutes no defense.

Remarriage of divorced persons within six months after divorce.

A remarriage of divorced persons within six months from the date of their divorce, though prohibited by section 3554, R. L. 1905, is valid until dissolved by judicial decree.

Defendant was indicted by the grand jury of Becker county for the crime of bigamy. Defendant demurred to the indictment, and for the purposes of the demurrer only the facts were stipulated. The demurrer was overruled, Taylor, J., and at the request of defendant the case was certified to this court. Affirmed.

[1]Reported in 130 N. W. 10.

[Note] Cohabitation as ratification of forced marriage, see note in 27 L.R.A. (N.S.) 805.

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George T. Simpson, Attorney General, and *Peter F. Schroeder,* County Attorney, for the State.

A. T. Cole and *Nye & Dosland,* for defendant.

BROWN, J.

Defendant was indicted and thereby charged by the grand jury of Becker county with the crime of bigamy. Upon arraignment he interposed a general demurrer to the indictment. At the hearing of the demurrer the parties stipulated to certain facts for the consideration of the court in ruling upon the question presented. The demurrer was overruled, and the court certified the question arising from the facts to this court for final determination. The facts, as so agreed upon, are as follows:

In January, 1908, defendant and Inga Marie Yoder, residents and domiciled in the state of North Dakota, were duly married to each other, and thereafter continued to reside together as husband and wife until the first day of May, 1909, when by a decree of divorce entered in the district court of Cass county, North Dakota, the marriage was dissolved. By the statutes of North Dakota divorced persons are prohibited from remarrying until after the expiration of three months from the rendition of the divorce. Thereafter, on August 9, 1909, and at a time when the parties could lawfully have remarried in the state of North Dakota, having evidently concluded that their divorce was a mistake, they came from their home in North Dakota to the city of Detroit, in this state, and there procured a marriage license, and were then and there again married to each other. The marriage was in violation of the laws of this state, which prohibits the remarriage of divorced persons within six months from the date of the divorce. They thereafter resided for a time in this state, but before the expiration of six months from the date of the North Dakota divorce returned to that state. They later, for reasons not stated in the record, separated and ceased to live together as husband and wife. On May 27, 1910, defendant and one Ruth Hull, both residents of North Dakota, came to the city of Detroit, this state, and after procuring the necessary license were then and there duly married, following which they returned to North

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Dakota as husband and wife. The second marriage between defendant and Inga Marie Yoder has never been dissolved or declared void in any judicial proceeding. The charge of bigamy laid in the indictment is founded upon the defendant's marriage to Miss Hull.

Though several questions are certified by the trial court, the ultimate and decisive question is whether the second marriage of the Yoders was an absolute nullity, and therefore no foundation for the charge against defendant of bigamy by reason of the marriage with Miss Hull. We pass, without considering, the suggestion of the state that since, at the time of the second marriage between the Yoders, they lawfully could enter into that relation in the state of North Dakota, where they resided, they might come into this state and become lawfully married (citing Bullock v. Bullock, 122 Mass. 3, and Phillips v. Madrid, 83 Me. 205, 22 Atl. 114, 12 L.R.A. 862, 23 Am. St. 770), and, for the purpose of the case, adopt the contention of defendant that the question presented must be determined by the construction and effect to be given to the statutes of this state.

It is well settled that, in order to justify a conviction on the charge of bigamy, the state must establish a valid first marriage and a second marriage in fact. It is also settled that evidence of a ceremonial first marriage carries with it a presumption of validity, except in those cases where shown to have been of a character declared by statute an absolute nullity. If the first marriage be declared null and void by statute, defendant may show the facts in defense without the production of a decree of court so declaring it. But the rule is different with respect to marriages which are only voidable, as distinguished from those which are mere nullities. Hughes, Criminal Law, 1989; Schouler, Domestic Relations, § 14; State v. Parker, 106 N. C. 711, 11 S. E. 517; Beggs v. State, 55 Ala. 108. As remarked in Schouler, Domestic Relations, § 14:

"A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arises directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity in direct proceedings instituted for the purpose."

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It is the contention of defendant in the case at bar that his second marriage with his first wife, having been entered into in violation of section 3554, R. L. 1905, prohibiting the remarriage of divorced persons within six months from the date of the decree of divorce, was an absolute nullity, requiring no decree or other judicial proceeding setting it aside, and therefore his marriage with Miss Hull was not bigamous. The statute relied upon in support of this contention provides that: "No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; nor between parties who are nearer of kin than first cousins, whether of the half or full blood, computed by the rules of the civil law; nor between persons either one of whom is epileptic, imbecile, feeble-minded, or insane."

The statute is prohibitory, and declares that marriage shall not be contracted between the parties mentioned, but does not declare the same, if consummated, void or a nullity. Defendant invokes the general rule applicable to all contracts entered into in violation of law, and insists that thereunder the marriage in question was a nullity. We are unable to concur in this claim.

While it is true that ordinary contracts entered into in violation of positive law are nullities and unenforceable, the rule has not, at least not by a uniform trend of decisions, been held applicable to marriage contracts. And there is every reason the rule should not be so applied. The marriage relation was commanded at the creation, and has come down through the ages as the safeguard of society, the morality of civilization, and the stability and well-being of governments. And though the contracting parties are primarily involved and their choice of life companions controlling, yet the state is concerned, and through the exercise of its police power regulates the entire subject and declares who may not enter into the relation. The marriage contract is sui generis, and essentially differs from the ordinary affairs of life, and the rules and principles of law controlling contract rights and liability respecting property and property rights should not be held in all respects applicable to the marriage contract.

A person may, after having entered into an ordinary contract, if

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in violation of positive law, refuse performance thereof, without the aid of the courts, and he may set up the illegality in an action to enforce the same. But the sacred nature of the relation, and obvious reasons of sound public policy, forbid that the person who enters into a marriage contract, though prohibited by law, may arbitrarily, and without a decree of dissolution, determine for himself the validity of the contract and reject or perform it at his pleasure. He may do so where by statute the contract is expressly declared void; such as marriages between near relatives, and in the case of a former husband or wife. But the rule should not be extended. The contract may become valid by consent, and the best interests of society demand a judicial inquiry, rather than the ex parte conclusion of one of the individuals concerned. An innocent party may be involved in contracts of that nature, and blameless offspring made dependent for their legitimacy upon the whim or caprice of an unnatural parent. For reasons of this character it has often been said by courts and judicial writers that a marriage contract is utterly void only in those cases where expressly so declared by statute. Stewart, Marriage & Divorce, 53; State v. Parker, 106 N. C. 711, 11 S. E. 517; Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641; Crawford v. State, 73 Miss. 172, 18 South. 848, 35 L.R.A. 224.

"Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, whenever the impediment is such as might not have been readily known to both parties before marriage, and where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of ab initio sentences of nullity." Schouler, Domestic Relations, § 14.

We do not overlook the fact that the courts are not in entire harmony upon the subject; but the weight of reason supports the doctrine that a marriage contract, regularly entered into, though prohibited, may be repudiated by one of the parties as a nullity, without dissolution by decree of court, only when declared null and void by express statute. All marriage contracts not so declared a nullity

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upon their face are voidable, and subject to repudiation only upon the entry of a judicial decree of dissolution. And in this connection it may safely be said that a marriage is not absolutely void in any case not expressly so declared by law, when by the subsequent conduct of the parties it may be ratified, confirmed, or made valid by cohabitation. Such is the case at bar. Here the statute only prohibited the remarriage of the parties for a definite time. They remarried before the expiration of the time so prescribed, and thereby violated the law; but it is clear that cohabitation after the time had expired would render the marriage valid by conduct, and it was not, therefore, an absolute nullity.

We are clear, also, that our statutes determine the question adversely to defendant without a resort to general principles of the law. Section 3569, it seems, settles the question beyond controversy. That section provides that all marriages which are prohibited by law "on account of consanguinity, or on account of either party having a former husband or wife then living, if solemnized within this state, shall be absolutely void, without any decree of divorce or other legal proceeding." The legislature, within its province, here singled out from the list of marriages prohibited by section 3554 the marriage between relatives, and where one of the parties has a former husband or wife living, and declared them absolutely void, leaving a necessary inference that it was the intention that all other prohibited marriages should be voidable only; hence valid until set aside by a decree of a competent court. In fact, marriages procured by fraud, and those contracted between infants and incompetents, are by subsequent sections of the statute declared invalid from the time so decreed by court.

Every reason of public policy justifies the ab initio declaration of invalidity in the cases mentioned, but not necessarily so in the other prohibited classes. We can include in the class of nullities marriages contracted as in the case at bar only by enlarging the statute, and this we have no right to do. The subject is purely legislative, and we are impressed that the legislature has wisely spoken. Though Miss Hull, in all probability innocent of any intentional wrongdoing, falls a victim to the wrong committed by defendant, we are not em-

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barrassed in reaching the conclusion indicated by the further reflection, often presented in cases of this kind, that innocent offspring may be made to suffer. Our statutes expressly protect their rights in situations of that kind. Section 3588, R. L. 1905.

The cases cited and relied upon by defendant are not controlling, and many of them are not in point. McLennan v. McLennan, 31 Ore. 480, 50 Pac. 802, 38 L.R.A. 863, 65 Am. St. 835; Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173; In re Smith, 4 Wash. 702, 30 Pac. 1059, 17 L.R.A. 573, and Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L.R.A. 605, all involved marriage contracts entered into in violation of statutes prohibiting the marriage of divorced persons within the time allowed by law for a review of the judgment of divorce in the appellate court. None of those cases involved a criminal charge of bigamy, and were properly decided upon the theory that a divorce does not, under statutes of that kind, become effective or absolute until the expiration of the time for a review of the judgment granting it, with the result that, until it does become effective and final, the marriage contract, for all intents and legal purposes, remains intact, and the marriage within the prohibited time brings the case within the clause of the statute declaring null and void marriages when one of the parties has a former husband or wife living.

Our conclusion, therefore, is that defendant's second marriage with his first wife was valid until set aside by a competent court and not a nullity, as contended.

Order affirmed.

JAGGARD, J., took no part.

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CHARLOTTE G. LUDWIG v. PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.[1]

February 24, 1911.

Nos. 16,590—(193).

Accident insurance — evidence — exclusive proximate cause of injury.

In an action to recover upon an accident insurance policy, it is *held* that the evidence was sufficient to justify the jury in finding that decedent was injured by accidental means, and that the injury so received was the proximate cause of his death, and, further, that the record presents no reversible errors in rulings or any instructions to the jury.

Action in the district court for Hennepin county to recover $5,000 upon an accident insurance policy. The defenses set up in the answer are stated in the opinion. The reply alleged that after the accident plaintiff, as soon as reasonably possible, gave to defendant notice thereof, and defendant waived all objection to such notice and waived the requirement of any other or different notice; that no loss had resulted to defendant by reason of the alleged failure to comply strictly with the requirements of the policy regarding such notice; that all terms of the policy providing that a failure to give such notice should result in a forfeiture of the right of the insured, were contrary to public policy and void.

The case was tried before Holt, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

M. H. Boutelle and *N. H. Chase,* for appellant.

Clarke & Carmichiel, Edward W. Hawley, and *Keith, Evans, Thompson & Fairchild,* for respondent.

[1]Reported in 130 N. W. 5.

[Note] What constitutes an accident within meaning of accident insurance policy, see notes in 30 L.R.A. 206; 5 L.R.A.(N.S.) 296.

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[JAGGARD, J.] [1]

An action was brought to recover the measure of indemnity, fixed in case of death at $5,000, on a policy of accident insurance in which plaintiff and respondent was designated as beneficiary, issued by defendant and appellant to plaintiff's husband. Defendant insured "against disability or death as herein defined, resulting directly, independently, and exclusively of any and all other causes from bodily injury effected solely through external, violent, and accidental means." One defense was that the death of the insured was not caused by accidental means, within the meaning of this paragraph. The other defense concerned notice and proof of death and other formalities. The case was tried to a jury, which returned a verdict in the full amount for the plaintiff. This appeal was taken from the order of the trial court denying defendant's alternative motion for judgment notwithstanding the verdict or a new trial.

1. The first controversy is whether the sole and exclusive proximate cause of death was external and violent.

The written application of the assured stated that he never had had physical infirmities or defects, and had not received medical or surgical attention within seven years immediately preceding. The application was incorporated into the policy.

During the fifth or sixth inning in a game of baseball, in which assured was engaged, he attempted to "steal second," and slid headforemost on his stomach the last nine or ten feet of the distance, stopping with his stomach over and upon the second base. This base consisted of a piece of a cement sidewalk paving block or slab, about two inches thick and twelve inches square, rough on one edge and smooth on the others. Plaintiff was declared "out," and according to some testimony stooped with his arms across his stomach. He walked back, and indicated that he was hurt and where. He, however, continued to play until the end of the game, but manifested pain. A day or two later he went home and called a physician. His condition grew gradually worse, until he was taken to a hospital and operated on for appendicitis. His death was caused by septic peritonitis. The autopsy revealed a gangrenous condition of the appendix. Two enteroliths or concretions of stony formation composed of hard-

[1] See per curiam order on page 517.

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ened fœcal matter, were found to be where the appendix was ruptured.

It appeared that plaintiff had consulted a physician once or twice somewhat more than a year previous to his death. The physician found some tenderness over the region of the appendix on pressure, and some soreness, and that he was suffering from a mild case of appendicitis, catarrhal in nature. The physician prescribed a laxative, and never heard him complain after that.

The trial court charged: "If you find that Ludwig had at some previous time suffered from an attack of appendicitis, and he had fully recovered therefrom, so that immediately before the external accidental injury at the ball game, if you find that there was such an injury received by him, there was then no appendicitis present, but because of such previous attacks Ludwig was more susceptible to the disease, and such an injury started it, there may be a recovery, although the external accidental injury would not have produced the appendicitis, if the appendix had never been previously impaired by disease. In other words, if Mr. Ludwig recovered from his former attack of appendicitis, if he had it, so that such disease no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this fall on the cement slab on the base is by you found by a fair preponderance of the evidence to be such exciting cause, and to be an external, violent, and accidental injury, the amount of the policy would become payable, upon proper notice and proof being made. But if, because of the former attack there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by Mr. Ludwig, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as joint result of the fall and the latent disease, and there can be no recovery."

On the subject of proximate cause the courts have been much at sea. Defendant has referred us to a number of cases. National M. A. Assn. v. Shryock, 73 Fed. 774, 20 C. C. A. 3; U. S. Mutual Accident Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. ed. 60; Western Commercial T. Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40

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L.R.A. 653; National Assn. of Ry. P. Clerks v. Scott, 155 Fed. 92, 83 C. C. A. 652; Commercial T. M. A. Assn. v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Hubbard v. Travelers Ins. Co. (C. C.) 98 Fed. 932; Central v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L.R.A. (N.S.) 933, 110 Am. St. 235; Binder v. National, 127 Iowa, 25, 102 N. W. 190. See the case of New A. Casualty Co. v. Shields, 155 Fed. 54, 85 C. C. A. 122. The policy clause was essentially identical with that in the case at bar. Several years previous to the time of the accident the assured had twice had appendicitis, but apparently recovered. While riding in a buggy he was thrown against the dashboard, striking his abdomen. Five days later he was operated upon for appendicitis, and died a week later. The Circuit Judges (Lurton, Severens, and Richards) approved this instruction of the trial court:

"In this case it is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies farther back, and is whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it, in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be one for recovery under the policy; but if, because of the former attacks, there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy."

This case and its reasoning meets our approval, and resolves this controversy in accordance with the ruling of the trial court.

2. Some doubt surrounds the question whether Ludwig's death resulted from bodily injury effected solely through accidental means. Defendant aptly urges: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expecta-

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tion. A result, though unexpected, is not an accident. The means or cause must be accidental." Thus in the following cases the injury sustained, although unforeseen, was held not to have been accidental, but to have been the result of means voluntarily employed.

In Schmid v. Indiana, 42 Ind. App. 483, 85 N. E. 1032, the assured did not expect that the exertion incident to carrying his luggage from the railway station to the hotel, in a rarified atmosphere, would result in paralysis of the heart. In Fidelity & Casualty Co. v. Stacey's Executors, 143 Fed. 271, 74 C. C. A. 409, 5 L.R.A.(N.S.) 657, the assured did not expect or foresee that striking a man in the face would produce an injury to his hand, developing into blood poisoning; or that in reaching over a chair and attempting to close the shutters (there being no slip of the foot) he would rupture an artery (Feder v. Iowa, 107 Iowa, 538, 78 N. W. 252, 43 L.R.A. 693, 70 Am. St. 212); or that in jumping from the cars, or in running to see if they were coming, he would rupture his groin (Southard v. Railway P. A. Co., Fed. Cas. No. 13,182); or that in attempting to remove his nightshirt over his head he would burst a blood vessel (Smouse v. Iowa, 118 Iowa, 436, 92 N. W. 53); or that in putting a drunken man off the premises he would injure his heart (In re Scarr, 1 K. B. [1905] 387, 1 Am. & Eng. An. Cas. 787); or that, owing to the exertion incident to assisting in carrying a heavy door, he would drop dead from heart rupture (Shanberg v. Fidelity & Casualty Co. [C. C.] 143 Fed. 651). For a clear statement of the rule, see Richards, Law of Insurance, § 385.

Defendant urges that there was no evidence whatever to show whether the death in this case was the consequence of the injury Ludwig received when he threw himself to the ground, or whether it was received when he encountered the paving stone base, that only by assuming that the bruise was received at the time of coming in contact with the base, and further assuming that Mr. Ludwig did not contemplate that his speed might carry him over and upon the base, can it be said that there was anything upon which the jury might decide, under proper instructions as to the law of the case, whether Mr. Ludwig did not in fact contemplate that he might possibly land on the top of the base. So far as the second of these assumptions is con-

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cerned, defendant's own brief contains this admission: "Counsel state that a ball player will slide to a base with no thought of injury. That is doubtless true. A man who had in his mind the fear or thought of possible injury while engaged in making a play or move usual and incident to any game of sport would soon find himself relegated to the bleachers."

On the record before us there was evidence enough on this point to carry the case to the jury.

A much closer question is presented by the record as to whether or not there was evidence sufficient to submit to the jury the question whether the bruise was received when Ludwig came in contact with the stone base. We have concluded, however, that there was enough to justify the submission of the question to the jury. More specifically there was no question that the slide was made, and that Ludwig was hurt at some point after he made the initial movement to slide and before getting up from the base. There was evidence that it was not necessary to do more than to touch the base with the hand. The decedent slid onto the cement block, and his abdomen went across it. A few days afterwards doctors found evidence of injuries—bruises and discoloration—upon his abdomen. In view of the fact that there was no evidence suggesting any other obstruction than this stone slab, it was for the jury to determine whether the external marks on the abdomen of the kind testified to were caused by the rough stone slab. The jury might properly have considered that the soft, dusty road over which the slide was made would not have produced such marks.

In this view the case at bar quite closely resembles, although it is not identical with, U. S. Mutual Accident Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. ed. 60. There the decedent was standing on a platform raised a few feet above the ground. He voluntarily jumped from the platform. In alighting, he struck the ground in such a way as to produce a severe jar, whereby a rupture of the duodenum was caused, from the effects of which plaintiff died. It was held that the cause of death was accidental. Blatchford, J., said: "It must be presumed, not only that the deceased intended to alight safely, but

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thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance;' unexpectedly taking place; not according to the usual course of things; or not as expected; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means." And see Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L.R.A. 653.

The remaining question in this connection is whether the charge of the trial court on this point constituted reversible error. The court charged: "If, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence would be accidental, and the injury one inflicted by accidental means." This, defendant says, was inaccurate and incorrect, but would have been made proper if the court had inserted the words "produced by something," so that the sentence would read: "If, as to the person injured, the injury was produced by something unforeseen, unexpected," etc. Obviously the charge actually given was not strictly accurate or correct. It was verbally wrong. The question then before us is whether it was so far verbally wrong that the defendant can avail itself of the verbal error by taking advantage of it at this stage of the proceedings. We have concluded that this failure to employ with strict accuracy all the words that were to make a complete and precise statement fell within the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

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PER CURIAM.

For the reasons given in the foregoing opinion, prepared by the late Justice JAGGARD, in accordance with the conclusions arrived at by the court, the order appealed from is affirmed.

SIMPSON, J., took no part.

EMMA M. LIBAIRE v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

February 24 1911.

Nos. 16,733—(84).

Collision at railroad crossing — action by married woman of foreign state — governed by Minnesota law.

Plaintiff, a resident of New York, was injured by a collision between an automobile in which she was riding and one of defendant's engines at a public crossing in Minnesota. The jury found for plaintiff. It is *held:*

1. Section 5001, R. L. 1905, imposes on a railroad company the duty of causing a bell to be rung or a whistle to be blown as a train approaches a public crossing. Hohl v. Chicago, M. & St. P. Ry. Co., 61 Minn. 321, followed.

2. An action by a married woman for personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile. Texas & P. Ry. Co. v. Humble, 181 U. S. 57, followed and applied.

3. Where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, two distinct causes of action may accrue — one to her, for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of the expense to which he may have been put. The wife in this state may sue in her own name for her injuries, which are direct. Mageau v. Great Northern Ry. Co., 103 Minn. 290, followed and applied.

4. Plaintiff, a married woman, was entitled to maintain this action in her own name, and to recover for injuries to her person, including damages for loss of earning capacity as a singer.

[1]Reported in 130 N. W. 8.

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Action in the district court for Ramsey county to recover $25,693.50 for personal injuries. The complaint alleged that on August 19, 1908, plaintiff was riding as a passenger in an automobile upon a public highway intersecting defendant's line of road at Cottagewood station; that she had no control over the movement or speed of the machine and took no part in its operation or management; that while being driven across the track the automobile was struck by defendant's passenger train; that the people on the front seat were instantly killed; that the automobile was overturned and plaintiff pinioned under it, after which the gasolene tank exploded, plaintiff barely escaping being burned to death; that the injuries sustained had permanently affected her health. The negligence alleged was that defendant's employees operating the engine failed to give proper or timely warning of the approach of the train by sounding the whistle or ringing the bell, in operating the train at a high and dangerous rate of speed, in failing to have the brakes and appliances by which the speed of the train was controlled in proper and safe condition; in failing to keep a proper lookout to ascertain whether any person or vehicle was approaching the crossing; and in failing properly to control and regulate the speed of the train, with an allegation that, by pleading these specific negligent acts and omissions, plaintiff did not waive the right to prove other and additional acts and omissions not inconsistent with those pleaded. The answer alleged that the injuries were caused through plaintiff's contributory negligence. The reply was a general denial.

The case was tried before Hallam, J., who at the close of the trial denied defendant's request for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $11,500. Defendant's motion for judgment notwithstanding the verdict was denied, and its motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to $8,500. From the order denying the motion for judgment and granting a new trial upon condition, defendant appealed. Affirmed.

Cobb & Wheelwright, John I. Dille, W. H. Bremner, Eugene Bryan and *George W. Seevers,* for appellant.

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The states of Colorado, Maryland, Louisiana, Pennsylvania, North Carolina, Oregon, Washington and Wyoming, have no statutes bearing upon the duty of railroad companies to give signals at highway crossings. The subject is governed by the common law. All of the other states have statutes that make it the duty of the railroad company to see that these signals are given, except Minnesota and New York. States, excepting the last two named, that have penal statutes applicable to engineers, also have civil statutes making it the duty of railroad companies to see that the signals are given. The several statutes mentioned will be found as follows: Alabama: Code 1907, §§ 5473, 5476. Arizona: R. S. 1901, Penal Code, § 355; Civil Code, § 869. Arkansas: Kirby, Digest, St. Ark. 1904, § 6595. California: 4 Deering, An. Pen. Codes St. § 390. Colorado: No statute. Connecticut: G. S. 1902, §§ 3786, 3787. Delaware: Laws 1893, c. 685. Florida: G. S. 1906, §§ 2841, 2842. Georgia: 2 Code 1895, §§ 2222, 2224. Idaho: Rev. Codes 1908, § 2821. Illinois: Hurd, R. S. 1908, p. 1674, par. 68. Indiana: Ind. An. St. Rev. 1908, §§ 2679, 5431. Iowa: Code 1897, § 2072. Kansas: St. Louis v. Payne, 29 Kan. 166; 100 Minn. 309 318. Kentucky: Russell St. 1909, § 5335. Louisiana: No statute. Maryland: No statute. Maine: R. S. 1903, § 70, c. 5, p. 524. Massachusetts: R. L. 1902, § 188, p. 1022, § 268. Michigan: 3 Howell An. St. § 3375, Supp. p. 3289. Mississippi: Code 1906, §§ 4045–4054. Missouri: R. S. 1899, § 1102. Montana: Rev. Codes 1907, § 4289. Nebraska: Comp. St. 1909, § 104, p. 583. Nevada: Comp. Laws 1861–1900, § 1012. New Hampshire: Pub. St. and Session Laws 1901, p. 516, § 6. New Jersey: G. S. 1709–1895, p. 2669. §§ 6, 8. New Mexico: Comp. Codes 1897, § 3859. New York: Cook's Crim. Code, 1909, § 1985. North Carolina: No statute. North Dakota: Rev. Codes 1905, § 4294. Ohio: Bates An. St. 1904, §§ 3336, 3337. Oklahoma: G. S. 1908, § 5942. Oregon: No statute. Pennsylvania: No statute. Rhode Island: Laws 1909, p. 727, §§ 14, 16. South Carolina: Code of Laws 1902, § 2132. South Dakota: 2 An. St. 1116, § 3944. Tennessee: Code 1896, § 1574. Texas: R. S. 1879, art. 4232; 12 S. W. 1121. Utah: Comp. Laws 1907, § 447. Vermont: Pub. St. 1906, §§ 4431–4432. Virginia: Pollard Code, 1904, § 1294d, par. 24, 25. Washington: No statute. West Virginia: Code 1906, § 2358. Wisconsin: St. 1898, §§ 1809a, 1819. Wyoming: No statute.

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Daniel F. Carmichiel and *Keith, Evans, Thompson & Fairchild*, for respondent.

[JAGGARD, J.] [1]

Plaintiff and respondent was being driven in an automobile across the tracks of defendant and appellant railroad company, on her way to the point of destination. The automobile and the engine collided, resulting in the injuries complained of. The jury returned a verdict for plaintiff of $11,500. The court reduced the verdict to $8,500. This appeal was taken from an order overruling defendant's motion for judgment notwithstanding the verdict or for a new trial.

1. Defendant contends: The trial court erred in instructing the jury that it was defendant's duty to cause the bell to be rung and the whistle to be blown on the train's approach to the crossing, as provided by section 5001 of the Revised Laws of 1905, in addition to its common-law duty on the subject. The instruction given on this point by the trial court was as follows: "Now there is a statute in this state that requires that an engineer, driving a locomotive on a railway, shall ring the bell or sound the whistle upon the locomotive, or cause the same to be rung or sounded, at least eighty rods from a road crossing on the same level, and to continue the ringing of the bell or sounding such whistle at intervals until such locomotive and the train attached thereto shall completely cross the road. I instruct you, gentlemen, that this statute is not a requirement that the engineer shall both keep sounding the whistle and ringing the bell, but it is a requirement that he shall do one or the other, or see that it is done; that is, to continue ringing the bell or sounding the whistle at intervals for the space of at least eighty rods before reaching the railroad crossing. Failure on the part of the engineer to observe this statute—that is, to ring the bell or sound the whistle at intervals, or see that it is done—is competent evidence of negligence on his part; not conclusive evidence of negligence, but it is to be considered in connection with other circumstances in the case."

One essential difference between the common-law duty and the statute duty is that under the statute the bell must be rung or the

[1] See per curiam order on page 524.

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whistle sounded at least eighty rods from the crossing. The common-law rule contains no such precise definition of the place where the signals are to be given. The defendant insists that the statute imposed the duty, not upon the defendant company, but upon its engineer, who is not a party to this proceeding; that an action may lie against the master for a breach of the master's duty by the servant, but not against the master for a breach by the servant of the servant's duty to the person injured.

This question of statutory construction is not, however, a new one in this state. On the contrary, that statute has been expressly construed. For example, in Hohl v. Chicago, M. & St. P. Ry. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. 598, Start, C. J., said: "It was the duty of the engineer in charge of the locomotive in this case to give the signals at the crossing or cause them to be given. A failure to do so is a misdemeanor. G. S. 1894, § 6637. It is not the province of the court to ingraft upon this statute any limitations not necessarily implied from the language used, and, inasmuch as the giving of such signals has a tendency in some cases to frighten animals from the railway track, we must presume that this was one of the results intended to be secured by the enactment of the law; hence an omission to comply with the statute in this case was evidence of negligence on the part of the defendant, but whether such omission was the cause of the accident, or not, was a question for the jury."

Good reason for the imposition of this duty upon the master is to be found in the general principle that the master may fairly be held to be under obligation to see that his servants do not violate the criminal law in the operation of its equipment and that legislative precautions for public safety should be obeyed by its employees. Respondent properly insists that "the only thing which differentiates that case from the case at bar is that in the one a colt was killed and in the other a woman was badly injured." It is true the specific point which defendant makes in this case was not expressly referred to nor considered by the trial court. None the less an express construction was placed upon this statute. The legislature has not seen fit to change that interpretation of its intention. See Everett

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v. Great Northern Ry. Co., 100 Minn. 309, 111 N. W. 281, 9 L.R.A. (N.S.) 703; Hendrickson v. Great Northern Ry. Co., 49 Minn. 245, 51 N. W. 1044, 16 L.R.A. 261, 32 Am. St. 540; Judson v. Great Northern Ry. Co., 63 Minn. 248, 65 N. W. 447; Czech v. Great Northern Ry. Co., 68 Minn. 38, 70 N. W. 791, 38 L.R.A. 302, 64 Am. St. 452; Croft v. Chicago Great Western Ry. Co., 72 Minn. 47, 74 N. W. 898, 80 N. W. 628.

2. It is also urged as error: The instructions of the trial court that plaintiff's loss of services as a singer should be taken into consideration in estimating the damages she sustained, in the event of a verdict for plaintiff. It appeared in the complaint that plaintiff's home was in New York, but the pleadings were entirely silent as to any issue concerning the effect of that fact upon plaintiff's right to recover for her injuries, because under the law of New York the husband might be alone entitled to his wife's services, and he alone might be entitled to recover for loss thereof. The law is, however, well settled that an action by a married woman for personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile. Texas & P. Ry. Co. v. Humble, 97 Fed. 837, 38 C. C. A. 502; affirmed 181 U. S. 57, 21 Sup. Ct. 526, 45 L. ed. 747.

Defendant seeks to distinguish this from the case at bar, because there, "under the Arkansas statute, a cause of action for damages for injury to the person, character, and property is given to married women by statute. In this state no such cause of action is given. The statute is silent upon the subject."

3. This proposition as to the status of a married woman forms a separate proposition of defendant's brief. That proposition is wholly a mistaken one. The statutes of this state are extremely liberal in their recognition of the right of a married woman to her separate existence, ownership of property, ability to contract, and right to her earnings, and capacity to sue or be sued in her own name. There are, indeed, border line cases. The law has liberally upheld her right to recover even for boarding which she has furnished to third persons, although this approaches closely to the line of the domestic service

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which she owes to her husband. It is entirely reasonable in such close cases that the law should require some agreement between the husband and the wife that she should have these earnings as her own property. See Riley v. Mitchell, 36 Minn. 3, 29 N. W. 588; Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137; Skoglund v. Minneapolis Street Ry. Co., 45 Minn. 330, 47 N. W. 1071, 11 L.R.A. 222, 22 Am. St. 733; Belyea v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 61 Minn. 224, 63 N. W. 627. It is well settled, however, in this state, that where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, two distinct causes of action may accrue—one to her, for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of expense to which he may have been put, and the like. The wife is allowed to sue in her own name for her injuries which are direct. Mageau v. Great Northern Ry. Co., 103 Minn. 290, 291, 115 N. W. 651, 946, 15 L.R.A.(N.S.) 511.

Under section 3606, R. L. 1905, "any married woman during coverture may receive, acquire, and enjoy * * * all avails of her contracts and industry free from the control of her husband * * * as fully as if she were unmarried." To this provision the court has given and should give a liberal construction. The words "all avails of her contracts and industry" contain no express restriction, and the juxtaposition of no preceding language limits them. On the face of this complaint nothing appears to give rise to any presumption or suggestion that under the law of this state the husband had any interest in the earnings of the wife as a singer. If the husband had any interest in what the wife earned by singing, the defendant should have asserted that matter by way of affirmative defense.

See also in connection with the subject of the status of the wife, R. L. 1905, § 4056; 2 Dunnell, Minn. Digest, "Husband and Wife," §§ 4258, 4289, 4293, 4296. Cf. section 4271, and Brooks v. Schwerin, 54 N. Y. 343; Harmon v. Old Colony, 165 Mass. 100, 42 N. E. 505, 30 L.R.A. 658, 52 Am. St. 499; Citizens v. Twiname, 121 Ind. 375, 23 N. E. 159, 7 L.R.A. 352; Healey v. Ballantine,

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66 N. J. L. 339, 49 Atl. 511; Ehlers v. Blumer, 129 Iowa, 168, 105 N. W. 406.

PER CURIAM.

For the reasons given in the foregoing opinion, prepared by the late Justice JAGGARD, in accordance with conclusions reached by the court, the order appealed from is affirmed.

SIMPSON, J., took no part.

MINNIE L. SMITH v. WILLIAM F. DOLKE.[1]

January 13, 1911.

Nos. 16,835—(162).

Appeal and error.

In an action to recover for money loaned, where there was a square conflict in evidence as to whether plaintiff ever made any loan to defendant, and the jury found for the plaintiff, it had the right to consider the appearance and demeanor of the parties upon the witness stand. The story of plaintiff was not improbable, inherently or otherwise, there were no errors in admitting or excluding evidence, and the case was affirmed on appeal. [Reporter.]

Action in the district court for Ramsey county to recover $1,010, which plaintiff alleged she loaned to defendant at the times specified in the complaint. The answer was a general denial. The action was tried before Orr, J., and a jury which returned a verdict in favor of plaintiff for $1,062.52. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Durment, Moore & Sanborn, for appellant.

Kerr & Fowler, for respondent.

PER CURIAM.

Action to recover for money loaned, which plaintiff claims has never been repaid to her. Defense, general denial. Plaintiff had a verdict, and defendant appealed from an order denying a new trial.

The contentions of defendant, namely (1) that plaintiff failed to establish her alleged cause of action by a fair preponderance of the evidence, and (2)

[1]Reported in 129 N. W. 1056.

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that the trial court erred in the admission and exclusion of evidence, have been fully considered, with the result that in our opinion neither contention is well founded.

While there was a square conflict in the evidence as to whether plaintiff ever loaned any money to defendant, plaintiff testifying that she did, and defendant that she did not, we are not prepared from the printed record to say that the appearance of the parties and their demeanor upon the witness stand was not sufficiently corroborative of plaintiff to justify the jury in concluding that she told the truth. This appearance and demeanor, and other circumstances appearing upon the trial, the jury had the right to consider. They found for plaintiff, and the trial court approved their verdict. The story of plaintiff is not at all improbable, inherently or otherwise, and we have no alternative but to affirm the case.

There were no errors in the admission or exclusion of evidence.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

GEORGE R. WHITNEY v. O. W. KERR COMPANY.[1]

January 13, 1911.

Nos. 16,953—(197).

Appeal and error.

In an action to recover a broker's commission for the sale of land, the evidence was not so manifestly against the verdict in favor of plaintiff as to warrant reversal by this court, on the ground the action of the trial court in denying a new trial was an abuse of discretion. [Reporter.]

Action in the district court for Hennepin county to recover $480 as commission at the agreed rate for finding a customer for land sold by defendant. The case was tried before Holt, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Koon, Whelan & Hempstead, for appellant.

Stewart & Brower, for respondent.

[1]Reported in 129 N. W. 1056.

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PER CURIAM.

Action to recover commission for procuring a purchaser for certain real estate held for sale by defendant. Plaintiff had a verdict, and defendant appealed from an order denying a new trial.

The only question presented is whether the evidence is so clearly and palpably against the verdict as to render the action of the trial court in denying a new trial an abuse of discretion. Whether plaintiff was the procuring cause of the sale for which he claims a commission is a close one upon the evidence, as it appears in cold type. The jury passed upon the evidence, found for plaintiff, and the trial court approved their verdict. We have carefully read the record, and, within the rule guiding this court in such cases, are not prepared to hold that the evidence is so manifestly against the verdict as to justify interference with the order of the court below. It would serve no useful purpose to discuss the evidence.

Order affirmed.

JAGGARD and SIMPSON, JJ., took no part.

F. C. BOWEN v. E. R. PRIEBE.[1]

February 24, 1911.

Nos. 16,731—(54).

Broker's commission.

Held: (1) The complaint stated a cause of action; (2) the evidence supported plaintiff's claim; (3) the court did not err in its charge; (4) there was no variance between pleading and proof. [Reporter.]

Action in the municipal court of Minneapolis to recover $50 for services rendered in procuring a purchaser for furniture and fixtures in, and the business of, a certain rooming house. The complaint alleged that plaintiff, at the request of defendant, found a purchaser for the furniture, fixtures and business, and that the sale was effected for the price and on the terms demanded by defendant; that plaintiff performed all the services required of him by defendant relative to the finding of the purchaser, and that plaintiff had performed his agreement; that defendant promised to pay plaintiff $50 for his services, but that no part thereof had been paid. The answer was a general denial, except

[1]Reported in 129 N. W. 1055.

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the admission of the ownership of the furniture and fixtures and that defendant was conducting certain rooming houses. The case was tried before Waite, J., who denied defendant's motion for an instructed verdict, and a jury which returned a verdict in favor of plaintiff for $50.40. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

A. C. Middelstadt, for appellant.

Hofstede & Johnston, for respondent.

PER CURIAM.

Action to recover $50, alleged to have been agreed upon as compensation for finding a purchaser for defendant's rooming house, furniture, and fixtures.

1. The complaint states a cause of action.

2. The evidence supports plaintiff's claim that defendant agreed to pay him $50 if defendant succeeded in exchanging his property for certain real estate belonging to a third party introduced by plaintiff.

3. The court did not err in instructing the jury that it was not uncommon to change a contract to sell property into a contract of exchange of property, with the understanding that the commission to the agent remain the same.

4. That there was a variance between the proofs and the complaint was not raised at the trial.

5. No errors in the charge or rulings.

Affirmed.

SIMPSON, J., took no part.

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ACTION.

Complaint construed, and *held*, that a cause of action for money had and received and another cause of action ex contractu for money had and received, in which the means used by defendant to secure plaintiff's money are alleged, are properly united therein; for both are in form ex contractu for money had and received. It is immaterial in such cases that the money was obtained by fraud.

—Benson v. United States Instalment Realty Co., 346.

APPEAL AND ERROR.

REVIEW.

Where a hypothetical question concerning a safe method of exploding dynamite is asked a witness, and the only objection thereto, that it was "incompetent and no foundation laid," was overruled, this court will not consider an objection, made on appeal for the first time, that the question did not embody substantially all the facts which the evidence tended to show. Frigstad v. Great Northern Ry. Co., 101 Minn. 40, 111 N. W. 838.

—Spino v. Butler Brothers, 331.

Where no objection is made to instructions given the jury that the charge as a whole was too indefinite and incomplete, the objection comes too late when first made on appeal. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

—Farris v. Koplau, 400.

A question not presented by any assignment of error and not discussed by appellant, though discussed by respondent, is not properly before this court and will not be considered.

—Creteau v. Chicago & Northwestern Railway Co., 421.

Where an appeal is decided adversely to the appellant on the main point, other points raised by the respondent which were not raised or passed upon in the lower court, will not be passed upon in this court. White v. Western Assurance Co., 52 Minn. 352, 54 N. W. 195.

—Foster v. Coughran, 439.

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APPEAL AND ERROR—Continued.

The rule in Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754, followed in a case where the charge to the jury was not strictly accurate, in fact was verbally wrong, but defendant did not call the matter to the attention of the court.

—Ludwig v. Preferred Accident Insurance Co., 516.

HARMLESS ERROR.

The exclusion of a question because it is incompetent, when error, is harmless, where the witness had already practically answered the same question.

—Lee v. H. N. Leighton Co., 375, 376.

EVIDENCE.

Where the record contains some evidence reasonably tending to sustain a verdict on a disputed question of fact, this court, on appeal, will affirm the verdict.

—Bloomquist v. Minneapolis Street Railway Co., 13.

It is not the province of the supreme court to reconcile conflicting evidence, nor to solve doubts arising therefrom. That duty rests upon the jury and trial court.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 173.

In a personal injury action, where the court held that the questions (1) whether defendant was negligent (2) whether plaintiff was guilty of contributory negligence and (3) whether plaintiff assumed the risk were for the jury, and the verdict was for the plaintiff, the evidence was not so far conclusive in defendants' favor upon either question as to justify interference by this court.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 173.

Where this court determines that the findings of the trial court are sustained by the evidence, it is not the province of this court to prove or demonstrate, by a discussion of the evidence returned on appeal, the correctness of the findings of the trial judge. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757. To do so would serve no useful purpose.

—Johnson-Van Sant Co. v. Martens, 488.

In an action to recover for money loaned, where there was a square conflict in evidence as to whether plaintiff ever made any loan to defendant, and the jury found for the plaintiff, it had the right to consider the appearance and demeanor of the parties upon the witness stand. The story of plaintiff was not improbable, inherently or otherwise, and the case was affirmed on appeal.

—Smith v. Dolke, 524.

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APPEAL AND ERROR—Continued.

DISCRETION OF TRIAL COURT.

The action of the court in granting relief, under R. L. 1905, § 4160, against a judgment taken against a person through his mistake or surprise, will not be reversed, except for a clear abuse of discretion. Dion v. Bassett, 102 Minn. 512, 113 N. W. 1133.

—Foster v. Coughran, 435.

Whether a verdict was so excessive as to indicate the jury were influenced by passion and prejudice, and hence a new trial, and not a reduction of the verdict, should have been ordered, is a matter resting largely in the sound judicial discretion of the trial court, and its action will not be reversed except for an abuse of discretion.

—Kerling v. G. W. Van Dusen & Co., 502.

In an action to recover a broker's commission for the sale of land, the evidence was not so manifestly against the verdict in favor of plaintiff as to warrant reversal by this court, on the ground the action of the trial court in denying a new trial was an abuse of discretion.

—Whitney v. O. W. Kerr Co., 525.

ASSAULT AND BATTERY.

The plaintiff recovered a verdict for $1,000 against the defendant for a personal assault. *Held*, that, while the evidence is radically conflicting, the verdict is sustained by the evidence, the damages are not excessive, and the court did not abuse its discretion in denying a motion for a new trial on the ground of newly discovered evidence.

—Austin v. Moffett, 290.

AUTOMOBILE.

The evidence justified the jury in finding that defendant violated Laws 1909, pp. 309, 310, c. 259, §§ 14, 16, in not having his automobile under control, and that in turning a corner to the right he negligently crossed over to the left side of the intersecting street and ran into plaintiff's son who was riding a motorcycle.

—Molin v. Wark, 190.

See Municipal Corporation; Use of Streets, 217, 232.

BIGAMY.

It is well settled that, in order to justify a conviction on the charge of bigamy, the state must establish a valid first marriage and a second marriage in fact. Evidence of a ceremonial first marriage carries with it a presumption of validity, except in those cases where shown to have been of a character declared by statute an absolute nullity.

—State v. Yoder, 505.

If the first marriage be declared null and void by statute, defendant may

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BIGAMY—Continued.

show the facts in defense without the production of a decree of court so declaring it. But the rule is different in respect to marriages which are only voidable, as distinguished from those which are mere nullities.

—State v. Yoder, 505.

BILLS AND NOTES.

Upon default of a contractor, the sureties upon his bond undertook the completion of his contract, and to borrow money from a copartnership executed their joint note. Even though one of the sureties, a member of the firm to which the note was given, had agreed to indemnify the other sureties against loss, a consideration for the note passed to each signer. Nor is any such surety signing the note entitled to be considered merely an accommodation maker.

—Noyes v. Ostrom, 111.

Action upon a promissory note against man and wife. Defense that the wife signed the note at the request and for the accommodation of her husband, and that he executed the note without consideration. *Held:* The contract between the parties set out in the opinion constitued a valuable consideration for the note.

—Latzke v. Albrecht, 322.

Action upon a promissory note. Defense, that defendant did not execute or deliver the note, and, if plaintiff had the promissory note described in the complaint, it was procured from defendant by fraud. Evidence *held* sufficient to justify the submission to the jury of the question whether the note was obtained by fraudulent representations and without negligence on the part of defendant.

—Farris v. Koplau, 397.

Under R. L. 1905, § 2747, a bona fide holder of negotiable instruments is not protected by his good faith, but takes title subject to the defense that the instrument was obtained by fraud.

—Farris v. Koplau, 399.

To constitute a defense under section 2747, it must be made to appear that (1) the instrument was obtained by fraudulent representations, trick or artifice, (2) the maker thereof did not believe he was signing a negotiable instrument; and (3) he was not negligent in signing it without knowledge of its contents. And it is clear that the parties in an action where such an issue is raised have the right to a submission of all these questions to the jury.

—Farris v. Koplau, 399.

BOUNDARY.

Action to determine boundary between two platted lots. *Held:* Where a definite tract of land is platted and subdivided into lots of regular

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BOUNDARY—Continued.

and specified dimensions, leaving at the end a remnant or irregular tract not sufficient from which to form a lot of the character of those laid out, and the plat indicates the size of all lots, including the irregular tract, and it subsequently appears that there is a deficiency of land to accord to each of the regular lots the dimension indicated by the plat if the irregular tract retains the area given to it, thus disclosing a clear mistake on the part of the person platting the land, the deficiency must fall upon the irregular tract, and not upon the regular and uniform lots. The same rule would apply in the case of an excess of land.
—Barrett v. Perkins, 480.

BROKER.

A real estate broker reported to another broker that he had a prospective purchaser for property listed with the second broker for sale. It was agreed that, if a sale was effected to such prospective purchaser, the second dealer would divide equally the commission he was to receive from the owner of the property. The second dealer then executed in due form an executory contract for the sale of the property, wherein the terms of sale were all definitely stated. The name of the purchaser was not disclosed, and was not inserted in the contract; the agent being named as vendee. The dealer so procuring the contract of sale was interested as purchaser with the undisclosed party, and this fact was not disclosed. The contract was subsequently carried out by the owner of the property, with full knowledge on his part and on the part of his agent of that interest. The owner paid the full commission to his agent. *Held*, that the agent procuring the contract of sale to the undisclosed prospective purchaser was not an agent of the owner of the property, nor of the agent having the property for sale, and that the agreement for a division of the commission was valid.
—Sherwood v. Lovett, 83.

In an action upon such agreement of the second broker for a division of profits, the court did not err in its charge to the jury.
—Sherwood v. Lovett, 83.

In an action by the purchaser to recover the amount paid by him to the agent of the vendor, it was *held:*

1. Where real estate is placed for sale in the hands of an agent, although the price and terms of sale are fixed by the owner, it is incompatible with the agent's duties to his principal to accept any payment as the agent of the purchaser. In case of such payment to the agent by the purchaser, the latter can recover the amount so paid.

2. The evidence was sufficient to sustain the jury in finding that appellant was the agent of the owner of the real estate purchased by re-

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BROKER—Continued.

spondent, and that without knowledge of such agency respondent employed him as his agent to negotiate a trade for the property.

—Steinmueller v. Williams, 91.

Where an agent for the sale of real property, charged as a matter of law with the usual obligations incident to that relation, informs his principal that he has secured a purchaser of the property, and procures from the principal an executory contract for the sale thereof, in which the name of the purchaser is not given, and he subsequently inserts in the contract his own name as purchaser, the relation of principal and agent, if the principal ratifies the contract, ceases, and that of vendor and purchaser takes its place.

—Christianson v. Mille Lacs Land & Loan Co., 120.

By so becoming the purchaser the agent forfeits his right to a commission for effecting a sale, and he is not, in the absence of a special agreement after the change of the relation, entitled to compensation.

—Christianson v. Mille Lacs Land & Loan Co., 120.

Held: The complaint stated a cause of action; the evidence supported plaintiff's claims; the court did not err in its charge, and there was no variance between pleading and proof.

—Bowen v. Priebe, 526.

CARRIER.

TRANSPORTATION OF PASSENGERS.

Personal injury action to recover for damages alleged to have been sustained by the negligence of the defendant in operating its passenger elevator while plaintiff was in the act of alighting therefrom. Verdict for $2,417, which was reduced to $1,500. *Held:*

1. The evidence sustained the verdict.
2. The testimony of the operator justified the instruction of the trial court to the effect that, if the elevator doors were opened by some one other than the operator, but with his knowledge or permission, it would be his act.
3. The verdict, as reduced, was not excessive, and it was not an abuse of discretion to reduce the verdict, instead of granting a new trial absolute.

—Clark v. Scandinavian-American Bank of St. Paul, 93.

Action for personal injury to a passenger while alighting from a train. Upon the third trial she had a verdict for $15,000. *Held:*

1. Plaintiff's testimony as to the manner of her injury was not incredible and it was corroborated, and defendant was not entitled to judgment notwithstanding the verdict.
2. The verdict was not so obviously against the weight of evidence that

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CARRIER—Continued.
the trial judge abused his discretion in denying defendant's motion for a new trial.
3. The damages were not excessive.
—Patzke v. Minneapolis & St. Louis Railroad Co., 168.

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—Sherwood v. Lovett, 85.

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—State ex rel. v. Village of Dover, 457.

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—State ex rel. v. Village of Dover, 457.

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—State ex rel. v. Village of Dover, 457.

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—Jacobson v. McCullough, 337.

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—Downer v. Union Land Company of St. Paul, 415.

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—McVay v. Mannheimer Brothers, 227.

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—Sherwood v. Lovett, 85.

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—State v. Yoder, 509.

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—City Water Power Co. v. City of Fergus Falls, 33, 36.

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—Woxland v. Northwestern Consolidated Milling Co., 446.

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—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

Jefferson v. Church of St. Matthew, 41 Minn. 392, 48 N. W. 74.
—American Bridge Co. v. Honstain, 17, 20.

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—Libaire v. Minneapolis & St. Louis Railroad Co., 517, 523.

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—Hammer v. Great Northern Railway Co., 212, 214.

Maylone v. City of St. Paul, 40 Minn. 406, 42 N. W. 88.
—Keever v. City of Mankato, 55, 64, 65.

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Orth v. Village of Belgrade, 87 Minn. 237, 91 N. W. 843.
—Keever v. City of Mankato, 55, 64, 65.

Roy v. Duluth & I. R. R. Co., 69 Minn. 547, 72 N. W. 794.
—Hivanen v. Duluth & Iron Range Railroad Co., 289.

State v. District Court of Hennepin County, 107 Minn. 437, 120 N. W. 894.
—State ex rel. v. District Court of Red Lake County, 298, 301.

Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.
—Bloomquist v. Minneapolis Street Railway Co., 16.

Texas & P. Ry. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747.
—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

Tuman v. Pillsbury, 60 Minn. 520, 63 N. W. 104.
—Roy v. Harrison Iron Mining Co., 147.

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Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868.
—Farris v. Koplau, 397, 400, 401.

Robertson v. Burton, 88 Minn. 151, 92 N. W. 538.
—Farris v. Koplau, 400.

COMMERCE.

The act of congress (35 Stat. 65, c. 149) imposing upon interstate carriers liability to employees engaged in interstate commerce for injuries received through the negligence of coemployees, is valid.
—Owens v. Chicago Great Western Railroad Co., 49.

CONSTITUTION.

Section 1 of article 11 of the state constitution was repealed by implication by the constitutional amendment prohibiting special elections.
—State ex rel. v. District Court of Red Lake County, 303.

Section 336, R. L. 1905, is not unconstitutional.
—State ex rel. v. District Court of Red Lake County, 303.

The limitation on the powers of corporations previously organized under G. S. 1866, c. 34, tit. 1, to condemn a right of way in the streets of a city or village, which was made by Laws 1893, p. 189, c. 74, did not impair the obligation of a contract or destroy any property right.
—Duluth Terminal Railway Co. v. City of Duluth, 459.

CONTEMPT.

Presentation of a petition to the court praying for the resubmission of certain charges of a violation of the law, which had been theretofore submitted to the grand jury and by that body considered and reported back to the court that no indictments were found. *Held*, the report of the grand jury that the charges had been considered and no indict-

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CONTEMPT—Continued.

ment found was a final determination of the same so far as concerned the reporting jury, and hence the petition was not a contempt of court, though the petition contained groundless charges of misconduct on the part of the grand jury.

—State v. Young, 96.

Improper interference with the administration of justice is the foundation of all contempt proceedings.

—State v. Young, 100.

The affidavit, the initiatory step in constructive contempt proceedings, need not be in any particular form, nor its allegations as direct, specific, and certain as required by law in indictments for criminal offenses.

—State ex rel. v. District Court of McLeod County, 304.

The judgment of conviction in such proceedings must be construed in connection with the affidavit and order to show cause, the foundation of the proceeding, and need not recite all the facts there disclosed.

—State ex rel. v. District Court of McLeod County, 304.

When the court is authorized by the facts to impose the punishment prescribed by R. L. 1905, § 4649, for contempt of court, it may award to the aggrieved party the costs and expenses of the contempt proceedings, including a reasonable attorney's fee. The statute vests in the court a wide discretion in matters of this kind, and authorizes it in a proper case to require the violator of an injunction to fully indemnify the aggrieved party, both with respect to damages suffered by reason of the wrongful act, and also to reimburse him for all proper and legitimate expenses incurred in bringing the wrongdoer to justice.

—State ex rel. v. District Court of McLeod County, 304.

Services of an attorney, rendered in the presence of the court, do not require evidence of their reasonable value. The court, when proper to be allowed, may fix the amount thereof from its knowledge of their value.

—State ex rel. v. District Court of McLeod County, 304.

CONTRACT.

OFFER AND ACCEPTANCE.

An offer was not expressly accepted, nor was it expressly refused. Acceptance of an offer by conduct may be as effective as by a formal declaration. *Held:* The evidence supported a finding that the offer was accepted.

—National Citizens Bank of Mankato v. Babcock, 495.

PERFORMANCE OR BREACH.

Where A. makes an agreement to pay the premium on a specified policy of insurance on the life of another, given as collateral security, such

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CONTRACT—Continued.

agreement assuming the continued existence of the insurance company issuing such policy and making no provision for the contingency of the company ceasing to do business, if thereafter such company becomes insolvent and ceases to do business, A. is thereby relieved from further performance of said agreement.

—Merritt v. Haas, 219.

The fact that, prior to its insolvency, the company issuing the policy reinsured all its policy holders in another insurance company, does not so substitute the contract for insurance by the new company for the policy described in A.'s agreement as to require him to pay premiums to the new company.

—Merritt v. Haas, 219.

Action for failure to furnish and lay tile in a new building, in accordance with a bid submitted and accepted. *Held:*

1. The findings of the trial court did not show that there was a mutual mistake, entitling defendant to equitable relief, or
2. That there was a want of mutuality in the obligations of the contract and therefore the contract was not enforceable.
3. Judgment in favor of plaintiff should not have been ordered.

—C. H. Young Co. v. Springer, 382.

MISREPRESENTATION OF PARTY.

Evidence and record considered, in an action to cancel a contract on the ground that the plaintiff was induced to make it by fraudulent representations, and *held*, that there was sufficient evidence to sustain the finding of the trial judge that no misrepresentation was made, and that there was no error in excluding certain evidence offered to prove a representation which was in fact not the representation made.

—McMullen v. Heaney, 348.

MISTAKE OF FACT.

A contract may be avoided by one of the parties for his own mistake of fact, when such mistake was caused by the inequitable conduct of, or when known to and wrongfully acted upon or taken advantage of by, the other contracting party.

—C. H. Young Co. v. Springer, 382.

CORPORATION.

LIABILITY OF STOCKHOLDERS TO PAY FACE VALUE OF THEIR SHARES.

Action in 1909, by a judgment creditor of defendant corporation, to compel the defendant stockholders to make good, by paying the difference between the par value of their stock and what they paid for it, so far as may be necessary to satisfy the judgment. Their alleged false repre-

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CORPORATION—Continued.

sentation, relied on by the plaintiff when he purchased the bonds of the corporation which are the basis of his judgment, which he obtained in 1902, was that they had paid the full par value of their stock. The bonds contained an agreement that no stockholder should be in any wise liable for the payment thereof and that no bondholder should be entitled to any remedy to enforce payment thereof against any stockholder. Plaintiff demurred to the defense in the answer which set up this agreement. *Held:*

1. It does not appear upon the face of the complaint that the action is barred by the statute of limitations.
2. The bond agreement was not a waiver by plaintiff of the liability sought to be enforced in this action.
3. That agreement is not a defense to the action.

—Downer v. Union Land Company of St. Paul, 410.

A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued.

—Downer v. Union Land Company of St. Paul, 416.

The presumption that creditors relied upon the representation that stock issued as fully paid is so in fact, is only prima facie.

—Downer v. Union Land Company of St. Paul, 417.

TRANSFER OF SHARES—LIEN OF CORPORATION.

Section 2863, R. L. 1905, providing that stock shall not be transferred upon the books of a corporation while any indebtedness of the record holder thereof to the corporation remains unpaid, *held* to create a lien upon the stock in favor of the corporation which can be foreclosed in equity.

—United States & Canada Land Co. v. Sullivan, 27.

A corporation's lien upon its stock is substantially dissimilar from the common-law lien upon articles of personal property which gives a right to the possession and detention of the property until the debt is paid. In the case of a lien upon corporate stock, the corporation has not the right of or the possession of the stock. The certificates of stock constitute the property, and may be transferred from hand to hand, by proper indorsement, though a transfer upon the books of the corporation cannot be compelled until the lien is discharged. Yet for all practical purposes the property in the stock passes upon assignment.

—United States & Canada Land Co. v. Sullivan, 31.

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CORPORATION—Continued.

TRANSFER OF SHARES—PLEDGE.

In an action to enforce a lien on a certificate of the capital stock of a corporation, the court found that a certificate of stock indorsed in blank and deposited at a bank as collateral security for a debt of the pledgor was sent to the office of the corporation and three new certificates were issued in lieu thereof; that two of the certificates were sold and the proceeds applied to the pledgor's debt; that the bank had no knowledge that any one but the pledgor had any interest in the original certificate; that the original certificate was the property of a third person. *Held:* That the findings of fact are sustained by the evidence, that they sustain the conclusion of law that the pledgee's estate had a lien on the third certificate.

—Barnes v. Davis, 132.

SALE OF ASSETS—ACCOUNTING TO FELLOW STOCKHOLDERS.

H. owned the majority of the stock of a corporation. S. and M. were also owners of the stock. In 1901 H., S., and M. made a so-called tripartite agreement, by which each agreed not to dispose of any shares of the stock without first offering them in writing to the other two stockholders on the same terms offered by any third person. H. died, and in July, 1908, his executors executed an option contract by which the tripartite agreement was annulled, and S. and M. secured an option to buy the shares belonging to the estate at the price of $300 per share, provided the option was exercised before September 1, and the sale was not made later than October 15, 1908. The sum of $150,000 was to be paid in cash, and $570,000 in deferred payments, as specified. August 21 four of the six plaintiffs assigned their shares of stock to S. and M. for $300 per share, to be paid on or before September 10, or, in default, the shares to be reassigned to their owners; and the other two plaintiffs gave S. a power of attorney to sell their stock.

S. and M. executed a written contract with J. to sell and deliver the four thousand shares of stock in the corporation on or before August 31, the purchasers to pay one million dollars in cash, and the vendors to take all the cash assets and bills and accounts receivable on August 31, and pay all the indebtedness of the corporation accrued on that day, and hold the purchasers harmless by reason of any lawsuits pending or accruing on or before that day. This contract was performed, the executors delivered their twenty-four hundred shares of stock direct to J., and received the sum of $720,000 therefor, upon a prior understanding with S. and M. that the sum of $45,000 should be returned to S. and M. in consideration of the executors being paid all cash, and also the

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CORPORATION—Continued.

$100 consideration paid for the option. Later H. paid S. and M. $45,100.

The six plaintiffs, who were either owners of stock or had the right to purchase certain shares, were paid at the rate of $300 per share, and in February, 1909, brought this action against S. and M. to set aside the assignment of stock and the power of attorney mentioned above, so far as those instruments may be claimed to give S. and M. any interest as purchasers of the stock described, and for an accounting of the $45,100 received by the defendants and of the amount collected out of the corporation assets taken by the defendants.

The trial court found as facts that the negotiations for the purchase of the H. stock were carried on in behalf of the plaintiffs and defendants by defendant M., and after the execution of the option contract S. and M. by their conduct assured plaintiffs that they would hold the contract for the joint benefit of all the plaintiffs and defendants; that the $100 consideration for the contract was paid from the funds of the corporation; that it was intended that the H. stock, when purchased, should be owned by plaintiffs and defendants pro rata according to their prior holdings of stock; that, after the contract with J., defendants conspired together to appropriate to themselves the profits which could be realized on the H. stock; and as conclusions of law found that the contract and rights in the H. stock were held by defendants in trust for the joint benefit of plaintiffs and defendants; that plaintiffs and defendants should share in that contract pro rata according to their prior holdings of stock, directed judgment in favor of plaintiffs for certain sums, respectively, as their share of the amount collected from the assets, and appointed a receiver to collect the uncollected assets. Defendants appealed from an order denying a new trial. Plaintiffs appealed from an order refusing to amend the findings and denying a new trial. *Held:*

1. The evidence sustained the finding that defendants were acting in a fiduciary capacity, that they secured the $45,100 without the knowledge of plaintiffs, appropriated that amount to their own use, and that they must account for it to plaintiffs.
2. The evidence and the facts found overcame any presumption that the H. stock was to be equally divided between plaintiffs and defendants, and warranted the court in making the inference that it was understood that the stock, when obtained, should be divided pro rata, according to their prior holdings of stock, by plaintiffs and defendants.
3. The trial court erred in allowing plaintiffs to share in the assets.

—Tuller v. Swift, 263.

Where the shares of stock in which two of the plaintiffs had an equity were

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CORPORATION—Continued.

sold by defendants for $10,000 more than the amount of the equity, the surplus was part of the assets of the corporation and passed to the defendants under the terms of the sale.

—Tuller v. Swift, 280.

FOREIGN.

The court upon the evidence correctly *held* that certain separators used in the equipment of the elevator were sold to the contractor by one of the lien claimants, a foreign corporation, at Milwaukee, Wisconsin, and that the transaction was not within the provisions of R. L. 1905, §§ 2888, 2889.

—American Bridge Co. v. Honstain, 16.

As stated in Guilford v. Western Union Telegraph Company, 59 Minn. 332, 61 N. W. 324, if, upon principles of law and comity, foreign corporations are allowed to do business and maintain suits in another state, the general rule should be that they are liable to be sued in the same jurisdiction. If our courts admit and vindicate their rights, justice also demands and necessitates that we enforce their liabilities.

—Archer-Daniels Linseed Co. v. Blue Ridge Despatch, 372.

COSTS.

Where quo warranto proceedings are instituted by the attorney general, as the representative of the sovereignty of the state, to redress an alleged usurpation of office or corporate franchises, he is not liable, officially or otherwise, to the defendant for costs in case the proceedings fail. R. L. 1905, § 4350, has no application to the attorney general.

—State ex rel. v. Village of Dover, 452.

The attorney general, however, when he institutes quo warranto proceedings on the information of a private party, may in his discretion join such party as a relator, who, in case the proceedings fail, will be liable to the defendant for costs. State v. Sharp, 27 Minn. 38, 6 N. W. 408.

—State ex rel. v. Village of Dover, 458.

COUNTY AND COUNTY OFFICERS.

The state is divided into counties, the jurisdiction of which, in all matters committed to them by the legislature, is limited to the boundaries of each. No county can, in the absence of legislative grant of power, reach out its hand and assert authority over territory not within its boundaries, either in the organization of towns, school districts or otherwise.

—Town of Farley v. Town of Boxville, 206.

An act providing for the organization of Kanabec county by its terms was not to take effect until adopted by the electors of Pine county. *Held*,

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COUNTY AND COUNTY OFFICERS—Continued.
the evidence submitted upon the trial did not sustain the finding that the county was duly organized thereunder prior to September, 1859.
—Rutherford v. Yorks, 248.
Section 339, R. L. 1905, relating to contest upon elections, must be limited to the specific questions of removal of county seats and changing the boundary lines of counties.
—State ex rel. v. District Court of Red Lake County, 302.

COURT.
A right arising under the federal constitution or laws may be enforced by the state courts. The amendment of April 5, 1910 (36 St. 291, c. 143) giving state courts concurrent jurisdiction and forbidding the removal of cases arising under the act of April 22, 1908, (35 St. 65, c. 149) adds nothing to the jurisdiction of state courts; its effect being only as to the right of removing to the federal courts actions brought in the state courts.
—Owens v. Chicago Great Western Railroad Co., 49.

COURT (DISTRICT).
Plaintiffs' complaint set forth: Decedent owned two hundred ten out of four hundred shares in defendant bank. The executor of his estate, who was also cashier of the bank, conspired with the other named defendants to part with control of the bank by the sale of thirty of those shares to friends of the executor, defendants herein, at an inadequate price. This sale was made nearly two months before the time for filing claims against the estate would expire. Plaintiffs were ready and had arranged to procure funds to discharge the obligations of the estate. These allegations were controverted. The district court restrained various individual defendants from disposing of their bank stock and the bank from recognizing any assignment.
It is *held* it was competent for the district court, in order to preserve the property in statu quo until the probate court could perform its functions with respect thereto to restrain the executor as an individual, and other stockholders and the bank, from disposing of shares of stock in the bank involved in the proper administration of the estate.
—Brown v. Strom, 1.

COURT (PROBATE).
A probate court is a court of record and has original and exclusive jurisdiction in the administration of the affairs of deceased persons. Under the orders of the probate court, an executor has the right of possession of the personal estate of decedent and the power to dispose thereof.
—Brown v. Strom, 1.

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COURT (PROBATE)—Continued.

Hence the district court cannot enjoin the executor of an estate appointed by the probate court, because the probate court can control his action. But its injunction against the executor as an individual and not as executor would be valid.

—Brown v. Strom, 1.

The district court, as a court of chancery, may not interfere with the exercise of the constitutional powers of the probate court, but in the interest of justice may exercise an ancillary jurisdiction, to aid the probate court in the performance of its proper functions.

—Brown v. Strom, 1.

CRIMINAL LAW.

Errors favorable to the accused are unavailable. Appellant was not prejudiced by the statement of the trial court to the jury that the indictment charged him with the offense of grand larceny in the second degree, when the facts set out in the indictment constituted grand larceny in the first degree.

—State v. Snyder, 244.

FOREIGN CORPORATION.

In the absence of allegations or evidence to the contrary, it will be presumed that a foreign corporation, doing business in this state, has complied with our statutes.

—State v. Murphy, 405.

RECEPTION OF VERDICT IN ABSENCE OF DEFENDANT.

The defendant was on trial for a felony, and was personally present at all times until the jury retired to consider their verdict. He then left the court room, being on bail, and unlawfully absented himself therefrom. The court, eighteen hours after the jury had agreed upon a verdict, and after exhausting all reasonable means to secure his presence in court, received the verdict in his absence. *Held*, that by his conduct he waived his right to be present, and that the court did not err in so receiving the verdict, nor in asking the jury, when they came into court after they had agreed, to be patient until the defendant arrived.

—State v. Gorman, 401.

The reception of the verdict in a trial for felony is a material part of the trial to the defendant, for he is entitled to have the jury polled. If defendant is in custody and he is not personally present when the verdict is received, it is reversible error; for the court, and not he, commands his jailer.

—State v. Gorman, 401.

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DAMAGES.

Plaintiff, at the time she was injured, was twenty years of age and in fair health. By reason of the injuries received she had been unable to stand on her feet, or walk, even with crutches and had to be carried from her bed to a chair and back again. There was little probability she would ever recover. In an action for the injury, *held*, a verdict for $15,000 was only compensatory.

—Patzke v. Minneapolis & St. Louis Railroad Co., 172.

In a personal injury action, where the medical testimony was conflicting and the opinion of three attending physicians of plaintiff was that his injury was permanent and he would be permanently incapacitated for any serious work, a verdict in his favor for $11,000 was not so large as to indicate passion or prejudice on the part of the jury.

—Kitman v. Chicago, Burlington, & Quincy Railroad Co., 350.

In this personal injury action the verdict of the jury, involving a finding that fright and nervous shock, resulting from an accident, caused the particular ailment for which damages were awarded, is sustained by the evidence.

—Ominsky v. Charles Weinhagen & Co., 422.

Where decedent was strong and healthy, thirty-eight years of age and left a wife of thirty-two years whose health was somewhat impaired, but no children, a verdict of $4,500 was not excessive.

—Woxland v. Northwestern Consolidated Milling Co., 446.

Where decedent was twenty-two years of age, his mother fifty-one and his father sixty-one, and he had contributed to her support from $250 to $350 per annum, had saved several hundred dollars, and was earning upwards of $1,000 a year, with prospects of early promotion, the court declined to set aside a verdict of $3,750.

—McVeigh v. Minneapolis & Rainy River Railway Co., 451.

DEATH.

Under section 4503, R. L. 1905, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon. Maylone v. City of St. Paul, 40 Minn. 406, 42 N. W. 88, and Orth v. Village of Belgrade, 87 Minn. 237, 91 N. W. 843, followed.

—Keever v. City of Mankato, 55.

Death by wrongful act. Whether plaintiff administratrix, the mother of decedent, had authorized a settlement made by defendant with the father, was decided on a former appeal to be a question of fact. *Held:* There being no evidence of authorization or ratification of such settlement, the court did not err in refusing to submit the question to the jury.

—McVeigh v. Minneapolis & Rainy River Railway Co., 450.

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DEATH—Continued.

Action for death of plaintiff's intestate, a son seventeen years old. Verdict on the third trial for $5,000, which the trial court reduced to $3,000. *Held*, that there was no abuse of discretion in reducing the verdict, instead of granting a new trial, and that, as reduced, the award of damages is sustained by the evidence.

—Kerling v. G. W. Van Dusen & Co., 501.

DEED.

The proper rule for the construction of a deed of conveyance which contains an exception or reservation is to ascertain the intention of the parties by a consideration of the entire instrument, the purpose of introducing the exception or reservation, its nature, and the attending facts and circumstances surrounding the parties at the time of its execution.

—Carlson v. Minnesota Land & Colonization Co., 361.

Generally speaking, an "exception" is a part of the thing granted, and must be in esse at the time of the grant. A "reservation" is some new thing created by the terms of the grant, as an easement or right of way. They are often used interchangeably.

—Carlson v. Minnesota Land & Colonization Co., 361.

DIVORCE.

A remarriage of divorced persons within six months from the date of their divorce, though prohibited by R. L. 1905, § 3554, is valid until dissolved by judicial decree.

—State v. Yoder, 503.

DRAIN.

The remedy for the correction of irregularities and defects in drainage proceedings is by direct attack, and parties to such proceedings cannot maintain an equitable action for that purpose. State v. Johnson, 111 Minn. 255, 126 N. W. 1074. In default of direct attack, the order laying the ditch becomes final and free from collateral attack.

—Slingerland v. Conn, 214.

The description of a ditch in drainage proceedings, as contained in the report of the engineer and order laying the same, need not be couched in such language that every layman may trace its location. It is sufficient, though described in part by technical words and recognized signs and abbreviations, if a competent civil engineer or surveyor may therefrom definitely locate the ditch upon the ground.

—Slingerland v. Conn, 214.

The rule is otherwise as to those who are not parties to the proceedings

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DRAIN—Continued.

and whose lands are not included therein. Bilsborrow v. Pierce, 101 Minn. 271, 112 N. W. 274.

—Slingerland v. Conn, 216.

ELECTION.

The question whether a new county shall or shall not be created and established, submitted to the voters under the statutes of the state, is independent and distinct from a proposition changing county lines, and not contestable under R. L. 1905, § 339, authorizing boundary line contests.

—State ex rel. v. District Court of Red Lake County, 298.

Sections 336 and 339, R. L. 1905, both provide for the contest of elections "upon a question submitted to popular vote," but under entirely different procedure. The two sections are in conflict, and it is *held*, under the rule above stated, that section 336 embodies the latest expression of the legislature upon the subject of such contests, and prevails over section 339, in so far as involves contests of that character.

—State ex rel. v. District Court of Red Lake County, 298.

ELECTRICITY.

The city of Winona, under authority of congress and of the legislatures of Wisconsin and Minnesota, constructed a bridge across the Mississippi river, from the Minnesota to the Wisconsin side thereof, and thereafter operated it as a toll bridge. By an ordinance duly enacted the city authorized defendant power company to string electric wires over and attach the same to the framework of the bridge for the transmission of electricity from its plant in Wisconsin to and the distribution thereof in the city of Winona. The city reserved the right to control the manner in which the wires were so strung, and directions in that respect were given by the ordinance. The wires so placed upon the bridge carry from twenty-five thousand to forty-five thousand voltage of electricity, and at times throw off a "brush" or "disruptive discharge" sufficient to cause the death of a person in close proximity therewith, without actual contact with the wire. The city thereafter let a contract for painting the bridge, and decedent was in the employ of the contractor in doing the work. He was killed while so at work by a "brush" or "disruptive discharge" of electricity from the wires. It is *held:*

1. Where the complaint, fairly construed, charged negligence in stringing the wires and alleged wires in the condition of those in question would throw off a "brush discharge" of electricity, it was sufficient to admit evidence of a "disruptive discharge" or of a "brush discharge." It would seem of no particular importance by what name the escaping electricity was known.

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ELECTRICITY—Continued.

2. The power company was unquestionably under legal obligations, in placing the wires upon the bridge, to exercise care commensurate with the dangerous character of the instrumentality, and to adopt such methods as were reasonably practicable to avoid endangering those who might be employed upon, or otherwise make legitimate use of, the structure as a thoroughfare.
3. If the wires were negligently strung upon the bridge, by reason of the fact that they were uninsulated, and not sufficiently elevated upon supports above the structure, to avoid persons coming in contact therewith while at work upon the bridge, both the city and the power company are liable.
4. Whether there was negligence in this respect was, on the evidence, a question of fact, and the verdict in favor of plaintiff is sustained.
5. The dangers from a "brush discharge" of electricity from the wire were unknown to the contractor or decedent, and both were entitled to warning thereof from the city.
6. The question of decedent's contributory negligence was a question of fact for the jury.

—Hoppe v. City of Winona, 252.

EMBEZZLEMENT.

An officer or agent of a foreign corporation may be convicted of the larceny of funds collected by it for a specific purpose, though there may be some defect in its organization, and it have only a de facto existence, and whether the corporation as a matter of law had authority to engage in the specific enterprise in this state.

—State v. Murphy, 405.

Money collected of the public by the members of the "Volunteers of America" for a charitable purpose was held by the corporation in trust for the purposes for which it was contributed, and the corporation was, within the meaning of the law, the owner of the same.

—State v. Murphy, 409.

Where it appears clearly from the evidence that the accused feloniously appropriated the money to his own use, and that a demand would have been unavailing, no demand for its return was necessary.

—State v. Murphy, 409.

EMINENT DOMAIN.

Any easement acquired under the statutory power to condemn becomes a property right and is protected; but the power, not exercised, conferred by general law, to acquire specific property by condemnation, is not a

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EMINENT DOMAIN—Continued.

property right, nor a matter of contract with the state, but was a matter of general law, and as such subject to modification.

—Duluth Terminal Railway Co. v. City of Duluth, 469.

PRIVATE USE OF PUBLIC STREET.

Chapter 74, p. 189, Laws 1893, an amendment to section 1 of title 1 of chapter 34, G. S. 1866, provided that no corporation formed under that title should have any right to construct, maintain, or operate upon or within any street of any city or village a railway of any kind, without first obtaining a franchise therefor from such city or village. This provision was in direct partial conflict with the provision of section 29 of that chapter, authorizing railway companies to acquire, by condemnation, the right to occupy any road, street, or alley for the necessary location of its railroad. To the extent of such conflict, section 29 was amended, and the right therein given a railway company to appropriate, through condemnation proceedings, such portion of highways as may be necessary for the construction of its road, without first obtaining a franchise, was limited to highways outside of cities and villages.

—Duluth Terminal Railway Co. v. City of Duluth, 459.

The amendment of 1893 applies to action taken thereafter, but with reference to such action the section is construed as if originally enacted in its amended form. It therefore limits the power conferred on all corporations organized thereunder, whether organized prior to or after 1893. The question whether such corporation could condemn a crossing over a public street is not considered.

—Duluth Terminal Railway Co. v. City of Duluth, 459, 471.

The city of Duluth, by ordinance, granted to the Duluth-Thunder Bay Railway Company a franchise on specified terms and conditions to construct a railway along Arthur avenue extended. Said company accepted the ordinance and is constructing the railway. Prior to the passage of this ordinance, but subsequent to its introduction in the city council, the petitioner herein instituted condemnation proceedings to acquire the right to construct a railway along the same portion of the street. The two rights being inconsistent, the franchise granted by the ordinance is the prior and superior right, and the city of Duluth had such an interest in the contract ordinance that it could introduce such grant in evidence, and base thereon an objection to the prosecution of the condemnation proceedings instituted by the petitioner; the Duluth-Thunder Bay Railway Company not objecting to such proceedings.

—Duluth Terminal Railway Co. v. City of Duluth, 459.

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EMINENT DOMAIN—Continued.

COMPENSATION.

When a railway company by condemnation proceedings seeks to take a strip of land for use in the construction and operation of its road, the property owner is entitled to the whole damage which he actually sustains by reason of the appropriation of his land and the construction of the road.

—Chicago, Milwaukee & St. Paul Railway Company v. Rehnke, 392.

If an additional strip is taken along an existing right of way, the depreciation in value of the remaining land by reason of the taking of the additional strip may be recovered.

—Chicago, Milwaukee & St. Paul Railway Company v. Rehnke, 392.

EQUITY.

The equitable jurisdiction of the court for the enforcement of statutory or other liens, even in the presence of a remedy at law by foreclosure, would seem to be settled in Minnesota by the decision in Forepaugh v. Pryor, 30 Minn. 35, 14 N. W. 61. In that case there was a lien by contract and also by statute. In this case the lien of the corporation upon its stock exists solely by statute, with no method for its enforcement provided by the law of its creation. We hold it may be foreclosed in equity.

—United States & Canada Land Co. v. Sullivan, 32.

EVIDENCE.

PRESUMPTION.

In the absence of pleading or proof to the contrary, it will be presumed that the common law of Montana is the same as in this state.

—Headline v. Great Northern Railway Co., 77.

COMPETENT EVIDENCE.

Incompetent evidence, if material, is sufficient to establish a fact in issue, when received without objection.

—Western Land Securities Co. v. Daniels-Jones Co., 317.

EVIDENCE RESPECTING VALUE.

In matters respecting the competency of witnesses on the subject of the value of property, the trial court is vested with a wide discretion, in the exercise of which in this case there was no abuse.

—Western Land Securities Co. v. Daniels-Jones Co., 321.

DOCUMENTARY EVIDENCE.

No inflexible rule can be laid down for the determination of the question whether entries in account books were made substantially contemporaneous with the transactions which they record. Each case must be

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EVIDENCE—Continued.

determined by the trial judge in the exercise of a practical discretion, in view of modern business methods; and his decision thereon will not be reversed if there be any evidence fairly tending to sustain it. The court did not err in receiving in evidence the account books in this case, nor in the application of payments. Jefferson v. Church of St. Matthew, 41 Minn. 392, 48 N. W. 74, followed.

—American Bridge Co. v. Honstain, 16.

In a personal injury action, wherein it was claimed that the tender to appellant's engine was defective, and the question in dispute was whether the engine left the roundhouse at a certain time, *held*, appellant's records, purporting to show the time all engines left the roundhouse to go upon the road, a record claimed to show the time when repairs were made upon engines, and a train dispatcher's record, purporting to show the movement of all trains, were not conclusive evidence that the engine left the roundhouse at the time claimed by appellant. The validity and correctness of the records were for the determination of the jury, and were properly submitted to the jury, to be considered in connection with all the evidence pertinent to the issue.

—Kitman v. Chicago, Burlington & Quincy Railroad Co., 350.

PAROL EVIDENCE—WRITINGS.

Parol evidence of the existence of a judgment of record in the court in which the action was on trial *held* properly excluded.

—McKinley v. Macbeth, 148.

OPINION EVIDENCE.

A mechanical expert may give his opinion as to the cause of the particular operation of mechanical appliances, based upon a history of the circumstances and conditions surrounding the operation.

—Owens v. Chicago Great Western Railroad Co., 49.

The contention is not sound that the testimony of experts in reference to the stringing of wires of high voltage over a bridge across the Mississippi river, involving a consideration of technical conditions, was conclusive. In giving their testimony they had in mind, not the protection of third persons from possible injury but the safety of the bridge and the fact that additional supports would increase the strain on the bridge, and were therefore impracticable.

—Hoppe v. City of Winona, 257.

Whether a method of exploding dynamite, adopted by a master, is safe or unsafe, is a subject for expert evidence.

—Spino v. Butler Brothers, 326.

Expert evidence is admissible whenever the subject of inquiry is such that,

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EVIDENCE—Continued.

in the judgment of the trial judge, persons not versed therein are liable to prove incapable of forming a correct judgment in the premises without such aid. It is not an objection to such evidence that it bears directly upon the issue to be determined by the jury. The trial judge has a wide discretion in the application of the rule.

—Spino v. Butler Brothers, 331.

A person with an experience of ten years in different capacities in the work of stripping mines, who had never seen or used defendant's method of exploding dynamite, was competent to testify as an expert concerning the safety of the method employed by defendant.

—Spino v. Butler Brothers, 330.

The testimony in this case was that the consensus of opinion of medical authorities established that the general baldness of plaintiff had its origin in fright and nervous shock. A court cannot assume, either that this conclusion is not well founded, because the morbid processes involved are not understood, or that it is based on insufficient data, because the experience and observation of laymen do not furnish sufficient data to establish such conclusion.

—Ominsky v. Charles Weinhagen & Co., 424.

EXCHANGE OF PROPERTY.

In an action for damages for breach of a contract for the exchange of land for a conveyance of improved property, where defendant claimed the written contract had been modified by parol agreement, pursuant to which he executed a deed to his property in favor of a third person, and delivered it to a bank, it was *held:*

1. The court did not err in its charge to the jury in referring to the fact that plaintiffs were behind in their payments on the contract.
2. Any error in admitting testimony as to the value of the land was cured by the charge to the jury.
3. A subsequent written contract between plaintiffs and the third person which corroborated defendant's claim of a modified contract was admissible in evidence.
4. The court did not err in its charge to the jury.
5. The verdict in favor of defendant was sustained by the evidence.

—McKinley v. Macbeth, 148.

Action to cancel and annul an executory contract claimed to have been procured by fraud. The evidence sustained the findings of the trial court in favor of plaintiff.

—Johnson-Van Sant Co. v. Martens, 486.

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EXECUTOR AND ADMINISTRATOR.

The personal representative of decedent, charged with the duty of administration of his estate, has neither the rights nor the responsibilities of an owner. In special cases the right of the heirs may be shown to be superior to those of the personal representative, and may be successfully asserted against the personal representative and third persons by the heirs.

—Brown v. Strom, 9.

In an action brought by an administrator to set aside the transfer of personal property made by the intestate in anticipation of death, *held*, the evidence justified the court in finding that the property was transferred to a third party in trust to pay the expenses and debts of the intestate after his death, and to distribute the balance among the members of his family; that the wife and children acquiesced in this disposition of the property; and, ample provision having been made by the order of the trial court for the payment of the creditors, the record furnishes no ground upon which the administrator can maintain the action.

—Ober v. Brewster, 388.

FRAUDS (STATUTE OF).

When one requests another to join him as surety upon a bond, and promises such other to save him harmless from loss upon the bond, the promise is an original agreement, and not within the statute of frauds.

—Noyes v. Ostrom, 111.

The rule that a contract for the sale or exchange of real property, required by statutes to be in writing, cannot be modified by subsequent parol agreement, has no application to a written contract so modified, which subsequently has been fully performed.

—McKinley v. Macbeth, 148.

Agreement to accept proceeds of assigned contract to cut timber and credit the amount on certain mortgage notes of the assignor was not the purchase of an interest in real estate, and for that reason void under the statute of frauds.

—National Citizens Bank of Mankato v. Babcock, 493.

GAS.

In an action for damages for negligently permitting gas to escape into the dwelling of plaintiffs, by reason of which a fire was started therein, injuring their persons and property, it is *held* that the verdict is supported by sufficient competent evidence, and that there were no errors in charge of the court justifying a new trial.

—Haas v. St. Paul Gaslight Co., 379.

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GRAND JURY.

The authority of the grand jury ceases with its report to the court, whether an indictment is returned or no indictment is returned as the result of their consideration of the charge.

—State v. Young, 100.

GUARANTY.

A compromise agreement in an action to recover against certain bondsmen, and approved by the court, construed to be an original promise, and not a guaranty.

—Merritt v. Haas, 219.

HUSBAND AND WIFE.

The finding of the trial court that a power of attorney from "Peter Roy and Philomen Roy, Sen. (wife of Peter Roy)," appointing another "true and lawful attorney for me and in my name," and continuing throughout in the first person singular, was intended to authorize the sale of the husband's land only, and not the separate property of the wife, *held* to be sustained by the evidence.—Roy v. Harrison Iron Mining Co., 143.

Where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, two distinct causes of action may accrue—one to her, for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of the expense to which he may have been put, and the like. The wife in this state may sue in her own name for her injuries which are direct. Mageau v. Great Northern Ry. Co., 103 Minn. 290, 115 N. W. 651, 946, 15 L.R.A.(N.S.) 511, followed and applied.

—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

The law is well settled that an action by a married woman for personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile. Texas & P. Ry. Co. v. Humble, 181 U. S. 57, followed and applied.

—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

Plaintiff, a nonresident married woman, was entitled to maintain this action in her own name, and to recover for injuries to her person, including damages for loss of earning capacity as a singer. R. L. 1905, § 3606.

—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

INDICTMENT AND INFORMATION.

The offense charged in an indictment is determined by the facts alleged, and not necessarily by the offense designated by name. Rule applied to

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INDICTMENT AND INFORMATION—Continued.

an indictment which states facts constituting grand larceny in the first degree, but which designates the offense as grand larceny in the second degree.

—State v. Snyder, 244.

Under an indictment which states facts constituting grand larceny in the first degree, although designating the offense as in the second degree, the accused may be found guilty in the second degree, if the evidence warrants. R. L. 1905, § 5371.

—State v. Snyder, 244.

INJUNCTION.

Defendant was restrained by injunction from constructing a ditch and thereby lowering the waters of a meandered lake. Defendant in violation of the injunction constructed the ditch. It is *held* that the court was authorized to require defendant, to purge himself of the contempt, to fill up the ditch.

—State ex rel. v. District Court of McLeod County, 304.

It is not material that defendant may have acted in good faith, believing he had the right to construct the ditch wholly on his own land, if the result of his work was that he violated the injunction.

—State ex rel. v. District Court of McLeod County, 307.

INSURANCE (ACCIDENT)

Action on policy of insurance "against disability or death as herein defined, resulting directly, independently, and exclusively of any and all other causes from bodily injury effected solely through external, violent, and accidental means." One defense was that insured did not die from accidental means, within the meaning of the policy. Decedent, a base ball player, during a game, slid head foremost on his stomach upon the second base, consisting of a cement paving slab a foot square. He continued to play until the end of the game. Later he was operated on for appendicitis and died from septic peritonitis. *Held:*

1. Whether the fall on the cement slab independently of any other cause was the proximate cause of the insured's death, or whether the death was the joint result of the fall and the diseased condition of the insured, was a question for the jury.
2. Whether the external marks on the abdomen were caused by the stone slab was a question for the jury.
3. The court did not err in its charge to the jury.

—Ludwig v. Preferred Accident Insurance Co., 510.

INSURANCE (INDEMNITY).

Plaintiff was informed on August 3 by the report of its traveling sales-

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INSURANCE (INDEMNITY)—Continued.

man that he owed it over $500, and there were credits and discounts due him sufficient to balance the account. During the succeeding three weeks it caused his accounts to be checked up. He remained in its employ and during September paid to plaintiff $75, on account of his shortage, which amount it retained. On September 28 he was discharged and defendant bonding company notified. Its bond provided that if the employer should fail to notify the company of any act of dishonesty on the part of any employee as soon as it should come to the employer's knowledge, then the company should be discharged from any liability under the bond as to such employee. In an action on defendant's bond to recover the balance of the shortage, it was *held:*

1. The object of requiring the notice is to enable the insurer to make investigation and to take the necessary steps to indemnify itself. After ascertaining the facts and being informed there was a probable shortage, the plaintiff was required to give notice within a reasonable time.
2. That the delay to notify defendant of the facts was unreasonable, and not in accordance with the provisions of the bond.
3. The court did not err in directing a verdict in favor of defendant.

—Gamble-Robinson Co. v. Massachusetts Bonding & Insurance Co., 38.

Action on defendant's bond, whereby it promised to indemnify the plaintiff for any loss sustained by the "culpable negligence" of its express messenger, in connection with the duties pertaining to the position, which term was defined by the bond to mean a failure to exercise the degree of care which men of ordinary prudence usually exercise in regard to their own affairs. The alleged breach of the bond was the negligence of the messenger in failing to keep the doors of his express car chained on the inside, which enabled robbers to enter the car, overpower him, and to steal from the car $5,000. Verdict for defendant. *Held:*

1. The negligence of the messenger, which would render the defendant liable, would be a failure on his part to exercise, in connection with the duties of his position, that degree of care which men of ordinary prudence usually exercise in regard to their own affairs of like gravity.
2. The bond defines the standard of care to be exercised by the messenger, which the plaintiff could not enlarge, as against the defendant, by establishing rules for the conduct of its business; but a rule making it the duty of the messenger to keep the car doors chained was admissible in evidence for the purpose of showing what were the duties pertaining to his position.
3. The mere fact that the messenger failed to chain the doors, if he did so, did not as a matter of law render the defendant liable; for it was a question for the jury whether, under all the facts which the evidence

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INSURANCE (INDEMNITY)—Continued.

tended to show, he omitted to do anything in connection with the duties pertaining to his position which a man of ordinary prudence would usually do in his own affairs of like importance.

—Great Northern Express Co. v. National Surety Co., 162.

INSURANCE (LIFE).

INSURABLE INTEREST.

Each partner in a firm took out insurance on his life, delivered the policies to the firm, and all premiums were paid by the firm. The firm was succeeded by a corporation and the policies were turned over to it as assets of the copartnership. On the death of one partner, whose policies were not formally assigned to the firm or the corporation, the insurance company paid the amount to defendant bank under a stipulation subject to the order of the court. In an action by the corporation against the bank, where the court found the policies were the property of the firm and of the succeeding corporation, and the findings are not questioned, *held:*

1. The other members of a firm have an insurable interest in the life of a partner.
2. Whether a corporation has an insurable interest in the life of a stockholder is not decided. But an insurance contract, which has been issued and carried in good faith upon the life of a member of a copartnership, may be assigned by the copartnership to the corporation organized for the purpose of succeeding to the business.
3. An assignment by the beneficiary of a life insurance policy may be made by parol; no objection being interposed by the insurer.

—Rahders, Merritt & Hagler v. People's Bank of Minneapolis, 496.

APPLICATION FOR INSURANCE.

Where there was evidence tending to show decedent had been treated by a physician in the two preceding years for a throat trouble, the nature of which apparently was not disclosed to decedent, but for which he went to Colorado for a couple of months, and returned apparently cured, the question whether the application failed to disclose a prior serious or permanent illness was one of fact for the jury, and the evidence sustains the verdict.

—Gruber v. German Roman Catholic Aid Society of Minnesota, 340.

A question concerning former illnesses and injuries, contained in an application for insurance, is material, and a truthful answer necessary to give validity to the insurance contract. But a general question, calling for information concerning "former illnesses" of the applicant, does not require the disclosure of an illness or ailment of a trifling, temporary, or

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INSURANCE (LIFE)—Continued.

unimportant nature, but only those of a serious, dangerous, or permanent character. Where the questions are specific, the rule would be otherwise.

—Gruber v. German Roman Catholic Aid Society of Minnesota, 340.

The court did not err in instructing the jury that, if the illness was of a serious, dangerous or permanent character, or of a nature continuous and not readily recovered from, it was decedent's duty to make it known, and if he failed to do so no recovery could be had. But if the illness was merely temporary in its character, unattended with any serious consequences, or from which serious consequences were not to be apprehended, from which he recovered, the failure to disclose it would not avoid the contract.

—Gruber v. German Roman Catholic Aid Society of Minnesota, 343.

MUTUAL BENEFIT INSURANCE.

The constitution and by-laws of respondent, a mutual benefit association, provide that the division secretary shall forthwith notify the secretary when a member is removed by death, and that the secretary shall forward to the division secretary blanks for making proofs of death; the amount of the policy being payable sixty days after the proofs are furnished, and there being no express provision that the beneficiary shall give notice of death or make proof thereof. John Kelly was a member in good standing, and disappeared from his home while suffering from a fatal disease, leaving his wife, the beneficiary, and four young children in destitute circumstances. The dues were paid and the policy kept in force for the period of six years after his disappearance. All of these facts were known to the division secretary.

In an action to recover the amount of the policy, commenced more than seven years after it lapsed for nonpayment of dues, *held:*

1. The policy did not become void for nonpayment of dues, since the evidence was sufficient to warrant the jury in finding that the member came to his death prior to the time payment was stopped.
2. It is to be implied from the contract that it is the duty of the beneficiary to notify the division secretary of the death of the member; but, when the facts are known to that officer without such notice, it is his duty to proceed at once and make up the proofs of death.
3. For the purpose of securing blanks and making and submitting proofs of death, the division secretary is the agent and representative of the association; and his failure to perform that duty will not release the association from its obligation to make payment of the claim, if the member died while the policy was in force.
4. While the beneficiary might have commenced an action on the policy

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INSURANCE (LIFE)—Continued.

within a reasonable time after making demand on the local secretary, her cause of action was not barred by the statute of limitations because of her failure to make demand, to furnish proofs of death, or to commence the action within six years from the time it might have been commenced.

5. The association cannot be heard to take advantage of its own negligence in failing to make up the proofs of death, or, if it repudiated the claim, in failing to notify her to that effect.

—Kelly v. Ancient Order of Hibernians Life Insurance Fund, 355.

JOINT ADVENTURE.

The rule that contributors to a fund, the purpose of which has failed, are entitled to return of their respective contributions, applied to two of the parties herein, who paid money "on account" of their interest in a proposed corporation never organized. Because the extent of their interest in the proposed corporation was not agreed upon, but was a subject of disagreement, they acquired no ascertainable interest in the proceeds of a contract entered into by the other two parties herein, though such contributions were used to perform, in part, the contract, and though the contracting parties intended to turn the contract over to the corporation when organized.

—Jacobson v. McCullough, 332.

JUDGMENT.

OPENING JUDGMENT.

The trial judge did not abuse his discretion in vacating a default judgment against the defendant and permitting him to answer.

—Dennis v. Firth, 235.

Lack of notice or knowledge of the pendency of the action is sufficient excuse, under R. L. 1905, § 4160, for the failure of an "unknown defendant" to answer therein, and authorizes the court, under said section, upon seasonable application, to give such defendant an opportunity to interpose a meritorious defense to the cause of action set out in the complaint.

—Foster v. Coughran, 433.

It is immaterial that a person could have obtained relief, as a matter of right, under another section of the statute within a year from the entry of judgment. Such other section does not afford an exclusive remedy in cases that also fall within the provisions of section 4160.

—Foster v. Coughran, 436.

A person who procures the title of the record owner by an unrecorded deed before the action, and is not named as defendant in the action, does not stand in the shoes of the record owner and is not bound to excuse the

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JUDGMENT—Continued.

default of the record owner. Otherwise where he procures his title after the entry of judgment.

—Foster v. Coughran, 436.

Nor does the right to relief depend upon defendant's title being superior to the title made by the judgment of plaintiff, but by his having a meritorious defense to the cause of action set out in the complaint.

—Foster v. Coughran, 436.

Section 3350, R. L. 1905, providing that "a certified copy of any judgment, decree, or order made by any court of record within the state, affecting title to real estate or any interest therein, may be recorded in any county where any of the lands lie, in the same manner and with like effect as a conveyance," is a recording act, and does not make the record of such judgment notice of the entry thereof, within the meaning of that part of section 4160, R. L. 1905, which limits the time within which applications for relief from judgments may be made to one year from notice thereof. The record of a judgment does not make lack of actual knowledge of the pendency of the suit or the entry of the judgment any less excusable.

—Foster v. Coughran, 437.

LANDLORD AND TENANT.

An express agreement controls to the exclusion of an implied agreement with reference to the same subject-matter; but the rule does not apply where the implied agreement is based upon the subsequent conduct of the parties, not covered by the express contract.

—Efron v. Stees, 242.

In a lease of a storeroom the lessor reserved the right of entry into the basement by means of the stairway in the rear of the room. Having subsequently occupied a part of the room for the storage of goods, the lessee, or his assignee, may maintain an action for the reasonable value thereof; the lease being silent upon the subject.

—Efron v. Stees, 242.

Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord.

—La Paul v. Heywood, 376.

Where a lease of real estate makes no provision for the payment of taxes, and provides that the structures or improvements put upon the lot by the lessee are removable, and the landlord is compelled to pay the entire amount of the taxes to save the property from being sold at tax sale, an action may be maintained by him against the tenant for the recovery of that portion of the tax levied upon the improvements.

—La Paul v. Heywood, 376.

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LARCENY.

In determining the meaning of the verdict in a criminal case, reference may be made to the evidence and record as well as to the indictment. The accused was on trial under an indictment which declared the offense to be grand larceny in the second degree, and the jury returned a verdict that he was "guilty in manner and form as charged in the indictment." The verdict was not ambiguous, and, when considered in connection with the evidence and the instructions to the jury, was a conviction of grand larceny in the second degree.

—State v. Snyder, 244.

The evidence justified the trial court in charging the jury that the accused could be found guilty in the second degree only.

—State v. Snyder, 244.

In a prosecution for grand larceny, it is *held* that the evidence justified a verdict of guilty, and that the record presents no reversible errors in the admission or exclusion of evidence, or in the instructions of the court to the jury.

—State v. Murphy, 405.

LIBEL AND SLANDER.

The general rule that libelous or slanderous statements uttered and published in the course of judicial or legislative proceedings are absolutely privileged does not extend or apply to public officers in general.

—Peterson v. Steenerson, 87.

Libelous publications, contained in reports of public officers other than in judicial or legislative proceedings, are only qualifiedly privileged.

—Peterson v. Steenerson, 87.

In such case the official character of the report prima facie protects the officer, and the burden is upon the person claiming to have been libeled to prove the falsity of the report and the malice of the author thereof.

—Peterson v. Steenerson, 87.

LIMITATION OF ACTION.

It is a settled rule of this court that, in an action for relief on the ground of fraud consummated more than six years before the commencement of the action, the complaint must allege facts showing that the fraud was not discovered until within six years next before the action was commenced; that, if it fails so to do, demurrer will lie, but in such a case, if the bar of the statute is not raised either by demurrer or by answer, it is waived.

—Downer v. Union Land Company of St. Paul, 413.

MANDAMUS.

East Grand Forks, by its common council, passed a resolution appointing a water, light and building commission, as authorized by Laws 1907, p.

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MANDAMUS—Continued.

588, c. 412, and named certain persons members of the board. Relator B. rendered certain services for which the commission allowed him a specified sum. He received a warrant signed by the president of the commission and the acting city clerk. The respondent, city treasurer, refused to pay the warrant because (1) the claim had not been allowed by the city council; (2) it had not been signed by the city clerk; (3) it had not been signed by the mayor; and (4) there was no money in the treasury in the fund upon which it was drawn. In proceedings to compel the treasurer to pay the warrant, the trial court granted a peremptory writ of mandamus and on appeal that action was affirmed by this court.

—State ex rel. v. McIlraith, 237.

MARRIAGE.

A marriage contract is a nullity ab initio only where expressly so declared by statute. In such a case it is absolutely void, requiring no judicial decree for its dissolution.

—State v. Yoder, 503.

A voidable marriage contract arises where, though prohibited by law, it may be ratified or confirmed by the subsequent cohabitation and conduct of the parties, and is valid until dissolved by judicial decree.

—State v. Yoder, 503.

The marriage contract is sui generis, differs essentially from the ordinary affairs of life, and the rules and principles of law controlling contract rights and liability respecting property and property rights should not be held in all respects applicable to the marriage contract.

—State v. Yoder, 506.

MASTER AND SERVANT.

ACTION FOR WAGES.

Action for wages. Dispute as to rate of wages and time of employment. Verdict for less than plaintiff's claim and more than defendant admitted. Former verdict was set aside as against the evidence. Second verdict was sustained by the evidence, and the court did not abuse its discretion in denying a new trial.

—Barnes v. Spencer, 101.

INDEPENDENT CONTRACTOR.

Where the issue is whether one has absolved himself from liability by turning over control of a mill or factory to an independent contractor, it is error to permit evidence that prior to the making of the contract the owner had taken out employer's liability insurance.

—Brown v. Douglas Lumber Co., 67.

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MASTER AND SERVANT—Continued.

Defendant city let a contract for painting a bridge which it had built across the Mississippi river, and plaintiff's intestate, while at work thereon for the contractor, was killed by a discharge of electricity from the wires of defendant power company which were strung upon the bridge under the direction of defendant city. In an action to recover for the death, *held:* The doctrine of independent contractor has no application to the case.

—Hoppe v. City of Winona, 252.

LIABILITY OF MASTER TO SERVANT.

In an action for the alleged wrongful death of plaintiff's intestate, it was held that the court did not err:

1. In submitting to the jury whether the master was negligent in locating a mortar box below a derrick upon a building in course of construction.
2. In its charge to the jury respecting the assumption of risk of negligence of fellow servants.

—Foley v. Hoy, 186.

In an action for personal injury, where plaintiff, while waiting in a passageway in defendant's store for a door to be opened, was injured by a boy reaching up and pulling down the open door of a sheet-iron box, it was *held:*

1. It was a question of fact whether such lid or door was an unsafe instrumentality.
2. It was a question of fact whether defendant was negligent in permitting an inexperienced boy to open and close such door under the circumstances.
3. The evidence was sufficient to support a verdict in favor of plaintiff.

—McVay v. Mannheimer Brothers, 225.

Action to recover for personal injuries sustained by the plaintiff, while in the service of the defendant and by its alleged negligence, in that its method of exploding dynamite was unsafe, and that it failed to instruct and warn him as to the hazards of the work. Verdict for him. *Held,* that the court did not err in denying defendant's request for a directed verdict; that the defendant's negligence, the contributory negligence of the plaintiff, and whether he assumed the risks, were each made by the evidence a question for the jury; and that the verdict is sustained by the evidence.

—Spino v. Butler Brothers, 326.

Plaintiff, riding to his place of work with his employer upon an auto truck guided by the latter, was injured in a collision with a street car. He recovered a verdict against both defendants. In an action against the master and the street car company, *held:*

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MASTER AND SERVANT—Continued.

1. His employer owed him the duty of exercising reasonable care in respect to the operation and control of the truck.
2. He was not engaged in a joint enterprise with his employer.
3. The negligence of the master cannot be attributed to the plaintiff.
4. If each defendant was guilty of negligence, plaintiff can recover of both defendants.
5. The evidence justified the jury in finding the concurrent negligence of defendants, acting independently, was the proximate cause of the injury.
6. The court did not err in denying judgment notwithstanding the verdict.

—Coleman v. Minneapolis Street Railway Co., 364.

Plaintiff's intestate was employed by defendant as an oiler and watchman. His duty was to oil gearings and other machinery in basement of elevator, some of which were above and others near the conveyor. The conveyor was a box, eight feet above the floor, made of planks in which ran a large steel spiral or screw for moving grain to the elevator shafts. At right angles to the conveyor, and at its level, were running boards by means of which oilers went from place to place while at work. In overhauling the machinery the conveyor was removed to a new location. The repairs had not been completed when defendant's foreman directed the machinery to be started to move certain grain. Decedent started to oil the machinery. After oiling a gearing at one end of the conveyor he walked along the box to oil machinery at the opposite side of the basement. In walking he stepped into an uncovered part of the box and died from the injuries received. In an action to recover for his death, in which the complaint alleged that defendant was negligent in starting the machinery with this dangerous instrumentality uncovered without informing decedent of its condition, and that the basement was dimly lighted, and decedent was unable in the exercise of ordinary care to discover that the machinery was uncovered, it was *held:*

1. As it appeared the machinery was set in motion without first complying with the law by covering the conveyor, the plaintiff can recover, unless decedent assumed the risks in making use of the conveyor box as a passageway, or was guilty of contributory negligence.
2. On the evidence it cannot be said, as a matter of law, if he had a right upon the conveyor, that he assumed the risk of its uncovered position. The question of his assumption of risk was properly submitted to the jury.
3. The questions of negligence and contributory negligence were properly submitted to the jury.

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MASTER AND SERVANT—Continued.

4. The court did not err in refusing defendant's motion for judgment notwithstanding the verdict, or for a new trial.

—Woxland v. Northwestern Consolidated Milling Co., 440.

LIABILITY OF RAILROAD COMPANY TO SERVANT.

Action by freight conductor for personal injury while his train was in Illinois, where there is no "fellow servant" statute. Plaintiff relied upon act of congress of April 22, 1908 (35 St. 65, c. 149). Injury was caused by violent stop of train, which plaintiff claimed was due to improper handling of the air brakes by the engineer. *Held:*

1. The act of congress is valid.
2. The issue being whether the progress of a train was suddenly arrested by the act of the engineer, or the maloperation of the brake apparatus, it was not error to instruct the jury, if the sudden stoppage was unnecessarily made by the engineer, the plaintiff could recover.
3. The verdict was sustained by the evidence.

—Owens v. Chicago Great Western Railroad Co., 49.

An engine upon a passing track had been separated from its train to leave a public street at a station open, and was moved back to its train while an engine upon a fast train was stopping upon the main track, and crushed plaintiff's intestate between the bumpers. There was a direct conflict in the testimony of the witnesses. *Held:* It was for the jury to decide whether the accident happened by the premature backing of the engine and whether decedent was guilty of negligence. The verdict in favor of plaintiff was sustained by the evidence.

—Griffith v. Great Northern Railway Co., 126.

Plaintiff's intestate was a bridge carpenter employed by the defendant. The contract obligated the defendant to furnish him transportation to any place where it required him to work. While being so transported on a railway train of the defendant in Montana, there was a collision between his train and one of its freight trains, whereby he was killed. The collision was caused by the negligence of the engineer and conductor of the freight train. This action was brought in the district court of Minnesota to recover damages for his death. Verdict for the plaintiff, but judgment was ordered for defendant notwithstanding the verdict. *Held:*

A contract obligation, based on a valuable consideration, rested upon the defendant to safely transport the deceased to the place where it required him to work. Whether he was strictly a passenger while being so transported is immaterial, for by virtue of its contract it was the absolute duty of the defendant to exercise due care to secure his safe

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MASTER AND SERVANT—Continued.

transportation. The negligence of the engineer and the conductor was its negligence.

—Headline v. Great Northern Railway Co., 74.

A fireman, to take notice and observation of the condition of a semaphore signal by which the movements of his train were controlled, projected his body out of the gangway between the engine and tender, and was struck on the head by a pole placed near the track to sustain a telltale wire near the approach of a bridge, and seriously injured. *Held* that:

1. The questions (1) whether the defendants were negligent in maintaining the pole in the particular place, (2) whether plaintiff was guilty of contributory negligence in looking for the semaphore from his position in the gangway, and (3) whether he assumed the risk of danger of contact with the pole, were on the evidence questions of fact for the jury.
2. The court did not err in denying defendants' motion for judgment notwithstanding the verdict or for a new trial.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 173.

The law is well settled that a railway company may place structures and signal posts along and adjacent to its tracks, but in so doing must act with due regard to the safety of its employees. In this case the evidence supported the verdict that the pole was negligently placed and maintained between passenger tracks.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 176.

Where railway tracks were owned by one defendant company and used by the other defendant under a traffic agreement or lease for the operation of its trains, under the issues as made and submitted to the jury, no distinction could be made as regards the liability of defendants for the negligent maintenance of a telltale pole.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 177.

While a wrecking crew was engaged in raising a box car, plaintiff was directed by the foreman to take a position at one end of the car, which remained fastened when the power was applied, and to pry up with a pinch bar. The foreman assisted with another bar, when the car suddenly swung towards the plaintiff and caught his foot under the bar. *Held:*

1. The foreman was a vice principal.
2. Whether defendant was guilty of negligence in ordering the plaintiff to assume a dangerous position without proper instructions or warning was a question of fact.

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MASTER AND SERVANT—Continued.

3. It was also a question of fact whether plaintiff assumed the risk.
—Tendall v. Great Northern Railway Co., 473.

APPLIANCES USED IN THE WORK.

The safety of an appliance or instrumentality may depend on its location and use. It may be a safe instrumentality under some circumstances but unsafe under others.
—McVay v. Mannheimer Brothers, 225.

When a master sets apart and designates specific material for scaffold building, he is required to exercise due care in seeing that it is free from defects; and the workmen who construct a scaffold from such materials are justified in assuming that the material is reasonably suitable for the purpose. Rule applied where defective planks were carefully spliced and painted, so that ordinary observation would not discover the splicing.
—Lee v. H. N. Leighton Co., 373.

It is well settled that the obligations of the master to provide his servants with a reasonably safe place extends to the portion of the premises on which they are required to do their work, and such other places thereon and conveniences incidental thereto as they are expressly or impliedly invited or permitted to use.
—Woxland v. Northwestern Consolidated Milling Co., 445.

GUARDING DANGEROUS MACHINERY.

Defendant lumber company, by contract with Bell & Company, allowed them to take its lath mill and manufacture laths for one year at an agreed price per thousand laths. While working for Bell & Company, plaintiff was injured by a board hurled from the saws. In an action against both defendants for negligence in guarding dangerous machinery, and in not having guides between the saws, plaintiff recovered a verdict against both defendants. The lumber company appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial. *Held:*

1. Whether defendants Bell & Company were, as independent contractors, solely responsible to plaintiff for injury sustained while in their employ, was in this case a question for the jury.
2. The degree of diligence required of the owner of dangerous machinery, in guarding it as provided by statute, is greater than is ordinarily required of a master to see that machinery and appliances furnished by him are free from defects.
3. The charge to the jury ignored the distinction between defendants' duty to guard the machine and their negligence in operating it without the guides.

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MASTER AND SERVANT—Continued.

4. Defendant lumber company was entitled to a new trial.

—Brown v. Douglas Lumber Co., 67.

Whether R. L. 1905, § 1815, requiring elevator wells to be protected by a barrier, was enacted for the purpose of protecting those riding in an elevator, as well as those who might step into the elevator well, is not free from doubt and is not decided in this case.

—Tostason v. Minneapolis Threshing Machine Co., 396.

The revolving steel spiral or screw in the conveyor box of a grain elevator, placed eight feet above the floor, by means of which grain is moved along the conveyor to elevating shafts and thus transferred to bins or to a mill, is a dangerous piece of machinery within the meaning of our statutes, and, if located where workmen are likely to come in contact with it in the discharge of their duties, should be guarded as required by law. The duty to guard and protect machinery of this kind is an absolute one, and not discharged by the exercise of reasonable care.

—Woxland v. Northwestern Consolidated Milling Co., 443.

NEGLIGENCE OF FELLOW SERVANT.

The fellow servant rule has been accepted and enforced by this court, and its qualification, adopted by many other courts, to the effect that employees in independent departments are not fellow servants, has been rejected. This is settled by a long line of decisions of this court.

—Headline v. Great Northern Railway Co., 79.

The great diversity of judicial opinion as to the reason of the rule indicates that it does not rest on any substantial basis of reason or justice, otherwise there would be unanimity; and that the true reason for its adoption was an economic one, in order to foster industries by relieving the master from liability to any of his employees for personal injuries due to the negligence of any other of his employees in the same industry.

—Headline v. Great Northern Railway Co., 79.

The injustice of making this exception to the rule of respondeat superior is obvious, thus compelling those who receive the least from an industry to assume its hazards to life and limb from the negligence of those over whom they have no control and in whose selection they have no voice.

—Headline v. Great Northern Railway Co., 79.

A bridge carpenter and an engineer of a train are clearly in separate departments of railroad work.

—Headline v. Great Northern Railway Co., 79.

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MASTER AND SERVANT—Continued.

One who directly causes an injury to another may be his fellow servant in the broadest sense of that term, but not such within the rule which exempts the master from liability.

—Headline v. Great Northern Railway Co., 81.

The question whether decedent's death was caused by the negligence of fellow servants was not presented by the evidence, and the court did not err in denying defendant's request to submit it to the jury.

—Woxland v. Northwestern Consolidated Milling Co., 440.

ASSUMPTION OF RISK.[1]

The question of assumption of risk is always one of fact for the jury, unless the evidence is conclusive that the servant assumed the risks; that is, whether the undisputed evidence is so clear and convincing that fair-minded men can reasonably draw but one conclusion. In such exceptional cases it is the right and duty of the court to determine the conclusion and instruct the jury accordingly.

—Spino v. Butler Brothers, 329.

The question cannot be determined from the point of view of the court room and by a strict adherence to the principle that every man must look out for himself, but from the point of view of those who are compelled by necessity to engage in dangerous occupations and to do as they are told.

—Spino v. Butler Brothers, 329.

CONTRIBUTORY NEGLIGENCE.[2]

In an action to recover for the wrongful death of plaintiff's intestate, it is *held* that decedent was, as a matter of law, guilty of contributory negligence in walking to his work in a railroad yard upon a railway track, instead of between the tracks. Magliani v. Minneapolis Transfer Ry. Co., 108 Minn. 148, 121 N. W. 635, followed and applied.

—Hammer v. Great Northern Railway Co., 212.

In an action for an injury received by plaintiff, a man of seventy-eight years, in stepping off a freight elevator, which he had used nearly every day for three years, before it reached the basement floor, the undisputed evidence conclusively shows that he was guilty of contributory negligence and assumed the risks.

—Tostason v. Minneapolis Threshing Machine Co., 394.

PLEADING.

Personal injury action against the Chicago, Burlington & Quincy Railroad

[1] See also Liability of Master to Servant, 186, 326, 440; Liability of Railroad Company to Servant, 173, 473.

[2] See also Liability of Master to Servant, 326, 364, 440; Liability of Railroad Company to Servant, 126, 173.

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MASTER AND SERVANT—Continued.

Company, and the complaint alleged that the plaintiff was in the employ of that company. The accident occurred while the road was operated by the Chicago, Burlington & Quincy Railway Company. The answer admitted the employment by the railroad company, and by special defense alleged that plaintiff was in the employ of the Chicago, Burlington & Quincy Railway Company, and had released that company from further liability by accepting benefits from the relief department thereof. *Held*, the admission that the plaintiff was in the employ of the railroad company was controlling, and that evidence offered in support of the special defense was properly rejected.

—Kitman v. Chicago, Burlington & Quincy Railroad Co., 350.

EVIDENCE.

In an action to recover for the alleged wrongful death of plaintiff's intestate, caused by the fall of a plank from a high building, where the question was whether the plank was dislodged from its position by the wind, it was not reversible error for the court to exclude an offer to show the velocity of the wind during the two weeks preceding the accident, where the offer did not indicate that the direction of the wind was the same, or the conditions respecting the plank and its position were the same.

—Foley v. Hoy, 186.

MECHANIC'S LIEN.

Appeal from a judgment establishing and enforcing mechanics' liens on the premises described in the complaint in favor of the respective respondents. *Held:* The evidence was sufficient to sustain the findings of fact as to each claim for a lien, and the record presents no reversible errors.

—American Bridge Co. v. Honstain, 16.

Where a lien statement, read as a whole, is sufficient to enable an interested person to locate the property with reasonable certainty, it is valid as to the description. Doyle v. Wagner, 100 Minn. 380, 111 N. W. 275.

—American Bridge Co. v. Honstain, 20.

A lien statement sufficient in form and substance was filed and recorded. Three days thereafter, and before the time of filing a lien had expired, the notary who drew it took it from the office of the register of deeds. A change was made in the description, he then called over the telephone the person who verified the original statement, stated the change and asked if that person acknowledged the corrected statement. After an affirmative answer, the statement was then refiled and recorded. *Held:* (1) There was no intention to abandon or waive the lien, but on the contrary a purpose to enforce it, and (2) what was done after the

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MECHANIC'S LIEN—Continued.

lien was filed and recorded was a nullity and could not affect the rights of the parties.

—American Bridge Co. v. Honstain, 21.

In an action to foreclose a mechanic's lien, the findings of fact to the effect that certain material furnished the contractor by a third person was not in legal effect a part of the material furnished by plaintiff *held* sustained by the evidence.

—Samels Lumber Co. v. Kropf, 200.

MINE AND MINERALS.

A deed conveying eighty acres of land contained the following reservation and exception: "Reserving and excepting from said lands such as are now known, or shall hereafter be ascertained, to contain coal or iron, and also the use of such surface ground as may be necessary for mining operations, and the right of access to such reserved and excepted coal and iron lands, for the purpose of exploring, developing, and working the same, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, with the reservations and exceptions before stated."

Held: The exception is not repugnant to the grant and is not void for uncertainty. The instrument operates as a conveyance of the land, with the exception of the coal and iron contained therein, reserving the right to enter upon the same for the purpose of exploring and mining the minerals excepted.

—Carlson v. Minnesota Land & Colonization Co., 361.

MORTGAGE.

The evidence was sufficient to warrant a finding that appellant, Hoerr, agreed to credit a stipulated amount on certain mortgage notes, in consideration of the relinquishment of all interest in a timber contract which had been assigned to him by defendant Babcock.

—National Citizens Bank of Mankato v. Babcock, 493.

MUNICIPAL CORPORATION.

ANNEXATION OF TERRITORY.

Whether unplatted territory, included within the limits of a village corporation, is so conditioned as properly to be subject to village government, is a question of fact, to be determined by the voters entitled to vote upon the question; and their decision cannot be disregarded, unless it clearly appears to have been the result of arbitrary action.

—State ex rel. v. Village of Dover, 452.

It does not conclusively appear from the evidence that the unplatted ter-

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MUNICIPAL CORPORATION—Continued.

ritory of the objectors, incorporated in the village of Dover, was included for the purpose of exacting revenue for village purposes and without regard to its adaptability to village government.

—State ex rel. v. Village of Dover, 452.

USE OF STREETS.

A driver of a motor vehicle, who negligently, because of excessive speed or not having his machine under control, fails to keep to the right of the intersection of a public street, when turning to the right, but crosses to the left instead, and collides with another vehicle lawfully upon that side of the street, whose driver is free from negligence, is responsible for the consequent damages. Sections 14, 16, c. 259, pp. 309, 310, Laws 1909.

—Molin v. Wark, 190.

The evidence justified the jury in finding that defendant violated this law in not having his automobile under control, and that in turning a corner he negligently crossed over to the left side of the intersecting street, and ran into plaintiff's son who was riding a motorcycle, who was lawfully upon that side of the street and free from negligence.

—Molin v. Wark, 190.

In an action for personal injury caused by an automobile coming in collision with a bicycle ridden by plaintiff, where there was a direct conflict in the testimony as to the number of the tag upon the automobile and as to other matters, the evidence was sufficient to justify the jury in finding that defendant was the owner of and an occupant of the automobile which collided with plaintiff. The trial court did not abuse its discretion in refusing to grant a new trial.

—Painter v. Davis, 217.

In an action to recover for personal injuries, in which defendants were jointly charged with negligence in obstructing a public street, defendant bridge company in placing building material on and across a sidewalk, and the city, with knowledge of the fact, permitting the same, it is *held* that the evidence presented questions of fact, both with reference to the alleged negligence of defendants and the contributory negligence of plaintiff, and sufficiently supports the verdict in favor of plaintiff.

—Hufman v. City of Crookston, 232.

WATER, LIGHT AND BUILDING COMMISSION—ACT OF 1907.

The water, light, and building commission created by chapter 412, p. 588, Laws 1907, for cities and villages containing a population of less than ten thousand inhabitants, has exclusive control of the village or city light or water plant, with authority to employ all help necessary

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MUNICIPAL CORPORATION—Continued.

to properly operate the same, to audit and allow all accounts for expenses incurred in the department, and to issue in the manner therein prescribed warrants on the treasury therefor.

—State ex rel. v. McIlraith, 237.

The approval or allowance of such accounts by the city or village council, or the signature of the mayor thereof to the warrants issued by the water commission, is not necessary to the validity of the same.

—State ex rel. v. McIlraith, 237.

The city clerk, duly appointed and qualified as such, absconded from the state and abandoned his office. Thereafter the city council appointed a resident of the city "assistant city clerk," who thereafter qualified by taking the required oath, took possession of the office, and performed, with the co-operation of the city council and acquiescence of the public, all the duties pertaining thereto. It is *held*, though the appointment was unauthorized and irregular, that the person so appointed and acting was during his incumbency of the office de facto city clerk.

—State ex rel. v. McIlraith, 237.

In the absence of a showing of apportionment by the city council of the current expense fund created by section 88, c. 8, p. 41, Laws 1895, among the several departments of the city, it is *held* that the expenses of the city water department are payable from the current expense fund.

—State ex rel. v. McIlraith, 237.

OPERATION OF WATERWORKS.

A complaint charged that defendant city negligently allowed the supply in its waterworks system to become polluted with poisonous substances, and large quantities of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it was *held:* The municipality was liable for its negligence in its private or corporate capacity, and was not exempt because it was carrying out a governmental function.

—Keever v. City of Mankato, 55.

OPERATION OF TOLL BRIDGE.

The city of Winona constructed a bridge across the Mississippi river, pursuant to authority of congress and the legislatures of Wisconsin and Minnesota, and operated it as a toll bridge. By ordinance it authorized defendant power company to string electric wires over and attached to the framework of the bridge, reserving the right to control the manner in which the wires were strung. *Held:* The relation of the city

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MUNICIPAL CORPORATION—Continued.

to the bridge was that of private owner of a quasi public highway, and its grant of authority to the power company to string its wires thereon was an exercise of its municipal and not of its governmental functions. In no essential respect did it differ from its relation to a public bridge upon a highway wholly within the city.

—Hoppe v. City of Winona, 252.

It is well settled that, when a municipality authorizes a third person to place upon its public streets agencies of a character likely to endanger the traveling public, even though the privilege granted be beyond its authority, liability arises upon injury to a person lawfully upon the street who is free from fault.

—Hoppe v. City of Winona, 261.

COLLECTION OF LOCAL ASSESSMENT.

By its charter the city of South St. Paul is authorized to levy assessments for local improvements, including curb and sidewalk, and the initial step required to bring a particular improvement within the scope of that authority is a resolution of the city council, duly passed, ordering the same to be made. The subsequent proceedings in awarding a contract for the carrying on of the improvement do not involve the authority to order the improvement, within the meaning of the charter provision that in the action for judgment on the assessment "no objections shall be interposed or sustained in relation to any proceedings prior to the confirmation of the assessment, except that the council had no authority to order the said improvement."

—State ex rel. v. District Court of Dakota County, 312.

Upon the application for judgment in the district court on the assessment levied by the city council for an authorized improvement, irregularity in awarding the contract for putting in the improvement, not shown to have resulted in injury to the property owner, is not ground for the setting aside of the assessment levied therefor by the city council.

—State ex rel. v. District Court of Dakota County, 312.

MUTUAL BENEFIT ASSOCIATION.

Where the constitution and by-laws of a mutual benefit association provide that the division secretary shall forthwith notify the secretary when a member dies, he is made the agent of the organization for the purpose of performing that particular act. He cannot protect the organization from liability by failure to perform his duty, and the organization cannot take advantage of his omission to act.

—Kelly v. Ancient Order of Hibernians Life Insurance Fund, 358.

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NEGLIGENCE.

INDEMNITY BOND.

In a bond of indemnity against the negligence of certain employees of plaintiff, it was stipulated that "culpable negligence," as used in the bond, should mean failure to exercise that degree of care which men of ordinary prudence and intelligence should exercise in regard to their own affairs. In an action on the bond by the employer, to recover the amount of a loss caused, it was alleged, by the negligence of an express messenger, the court in its charge defined culpable negligence in the words of the policy, and stated that was the standard of judgment which the parties had adopted for themselves, and for that reason the court had excluded evidence of a rule of the employer that messengers must keep the chain fasteners applied on the doors of their express cars.

Held: That the court, in connection with the charge, erred in excluding this rule, because it was competent for plaintiff to show what were the duties of the messenger in connection with his position, and the rule in question was neither arbitrary nor unreasonable, but a reasonable statement of the messenger's duty with reference to safeguarding his car. The tendency of the charge was to impress the jury that any evidence, oral or documentary, as to the messenger's duties, was unimportant, and in the judgment of the court immaterial. The exclusion of this evidence was reversible error.

—Great Northern Express Co. v. National Surety Co., 162.

OWNER OF HOTEL BUILDING.

Action to recover damages for personal injuries. It was the plaintiff's duty to deliver at the baggage room of defendant's hotel express packages for its guests, and obtain a receipt from its clerk. He delivered the packages, and in attempting to go from the room, along what he believed to be a passageway, to the clerk's desk to look for the porter and to get a receipt for his package, he fell into the shaft of the baggage elevator; the door leading to it being then open. Verdict for plaintiff. *Held:*

1. From the evidence it is obvious plaintiff was in the baggage room for the purpose of making delivery of packages upon the implied invitation of defendant, and while there he was neither a trespasser nor a bare licensee. Hence defendant owed him the duty of exercising ordinary care in keeping the premises in a reasonably safe condition.
2. Whether, in attempting to go from the baggage room to the office of

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NEGLIGENCE—Continued.

the hotel to obtain his receipt, he was acting within the scope of the implied invitation to enter the building was a question for the jury.

3. Whether defendant was negligent and whether plaintiff was guilty of contributory negligence were questions for the jury, and the court did not err in refusing to direct a verdict for the defendant.

—Conway v. Charles H. Wood & Co., 476.

PLEADING.

Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831, holding that the contributory negligence of plaintiff is not put in issue by a general denial, distinguished.

—Lee v. H. N. Leighton Co., 373.

NEW TRIAL.

In an action to recover the amount paid to defendant upon its fraudulent representations that it was due from plaintiff, who had acted as grain buyer for defendant, for shortage in the weights of the grain received by defendant, *held:*

1. There was evidence sufficient to sustain a finding that there was a shortage of six hundred sixty-nine bushels of wheat; but there was also evidence as to overages in flax, barley, and oats sufficient to reduce the total value of the shortage to $133.86.

2. The evidence was sufficient to sustain the jury in finding that respondent paid to appellant the sum of $516.18, because of appellant's fraudulent representations that respondent was indebted to it in that amount for shortage of grain shipped.

3. The jury returned a verdict of $650.04 for respondent, being the full amount of the shortage claimed by appellant; and upon appellant's motion for a new trial the court granted the motion, unless respondent would consent to a reduction of the verdict to $516.18. Appellant was not prejudiced by the order.

—McBrady v. Monarch Elevator Co., 104.

The exclusion of evidence not obviously material is not ground for a new trial.

—Lee v. H. N. Leighton Co., 376.

The failure of the court to instruct the jury upon all the elements necessary to constitute a defense under R. L. 1905, § 2747, relative to the procurement of negotiable instruments by fraudulent means, is not, in the absence of special requests or proper exceptions at the trial, ground for a new trial.

—Farris v. Koplau, 397.

A trial court has no authority to grant a new trial for errors not duly

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NEW TRIAL—Continued.

excepted to on the trial, or on a motion for a new trial, as provided for by R. L. 1905, § 4200. Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868, limited.

—Farris v. Koplau, 397.

NUISANCE.

The erection and maintenance of a dam across a natural water-course by a riparian owner for the purpose of ultilizing a water power is not a nuisance, nor is the owner thereof an insurer of its safety, but he is bound to exercise, in its construction and maintenance, a degree of care proportionate to the injuries likely to result to others if it proves insufficient. The dam must be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated. Wiltse v. City of Red Wing, 99 Minn. 255, 109 N. W. 114, distinguished.

—City Water Power Co. v. City of Fergus Falls, 33.

PARTNERSHIP.

In an action upon a promissory note, executed by defendants and indorsed before delivery by one member of plaintiff firm, the answer alleged that defendants became sureties upon a bond upon the representation of one member of plaintiff firm that he held as security sufficient property of the principal to meet any liability upon the bond and that he would save defendants harmless from any liability thereunder. *Held:*

1. It was error to instruct the jury that defendants were entitled to a verdict, if their contention was true that a member of the plaintiff firm had undertaken to protect them from loss under the bond.
2. Under all the circumstances disclosed, this is an action in which either plaintiffs or defendants may be entitled to equitable relief; and, all persons interested being parties to the action, such relief may be granted to each as he may show himself entitled to.

—Noyes v. Ostrom, 111.

Where the sureties on a ditch contract undertook the completion of the ditch, after the default of the contractor, they were, if not copartners, at least engaged in a joint enterprise.

—Noyes v. Ostrom, 115.

Under the evidence, the two parties herein making the contract in question were and are copartners in the performance of the contract, and as such are entitled to share equally in the proceeds.

—Jacobson v. McCullough, 332.

DISSOLUTION AND ACCOUNTING.

Plaintiff owned a flour mill, and entered in a partnership agreement with

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PARTNERSHIP—Continued.

defendant by which the latter agreed to spend money to repair and modernize it, pay the miller and supervise its running. Profits and losses were to be divided and borne equally. Correspondence passed between the parties before the execution of the agreement as to its meaning. The partnership was dissolved after five years. In an action for an accounting it was *held* that a modification of contract of copartnership, as found by the trial court, was sustained by the evidence.

—Ames v. Ames, 137.

Whether a sum advanced by one partner to improve real estate owned by a copartner, but used in the firm business, is, in this case, to be repaid from the firm assets, or to be considered a personal debt, due from the owner of the real estate—quære.

—Ames v. Ames, 137.

In the absence of an express agreement, partners are not ordinarily entitled to interest as against each other.

—Ames v. Ames, 137.

Action to recover from defendant upon a contract between the parties whereby the defendant agreed to pay the plaintiff $1,000 in consideration of his retiring from a copartnership which was state manager of its casualty business. *Held*, construing the documentary evidence referred to in the opinion, that

1. The date of retirement was changed by an agreement based upon a valuable consideration and proved by a clear preponderance of the evidence.
2. There was no ambiguity in the words used by the parties to express their intentions and the court correctly excluded evidence offered to show what the parties meant.
3. The court did not err in its charge to the jury.
4. The evidence was sufficient to sustain a verdict for the plaintiff.

—McInnis v. National Casualty Co., 156.

In an action for the dissolution of a copartnership and for the appointment of a receiver to wind up the firm affairs, the only questions necessary to be determined preceding the appointment of a receiver are: (1) The existence of the alleged copartnership; and (2) the facts necessary to vest in the court jurisdiction of the controversy.

—Norton v. Sperry, 447.

The appointment of a receiver in such an action in no way determines the rights of the partners, but is merely preliminary to a full hearing and adjustment of all differences, upon which the partners may be heard in the due course of subsequent proceedings.

—Norton v. Sperry, 447.

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PARTNERSHIP—Continued.

The finding of the court that the business of the firm extended to real estate transactions wnerever consummated is not conclusive, and will not bar the right of defendant to be heard at the proper time.
—Norton v. Sperry, 449.

ACTION WHERE PLAINTIFF AND DEFENDANT HAVE COMMON MEMBER.

When two copartnerships have a common member, neither firm may sue the other in an action at law, but may maintain an equitable action, in which the individual rights of all the members of both firms may be adjusted.
—Noyes v. Ostrom, 111.

PLEADING.

COMPLAINT.

In a complaint the inference of negligence from the evidentiary facts pleaded is not a presumption of law, but a rebuttable inference of fact. It is only where the evidentiary facts pleaded are such that the conclusion of the ultimate fact necessary to sustain the action inevitably follows that such a pleading can be sustained.
—City Water Power Co. v. City of Fergus Falls, 38.

REPLY.

Action for the purpose of enforcing a thresher's lien on a specific number of bushels of grain at a certain price per bushel. The answer alleged in defense that plaintiffs were not entitled to recover for the reason that they had violated a contract to thresh defendant's entire crop. In denial of the existence of such a contract, the reply alleged that plaintiffs stopped threshing for the reason that defendant had violated his contract to pay a stipulated price in case the price per bushel did not amount to a stipulated sum per day. *Held*, that the reply was in the nature of a plea in confession and avoidance, did not contradict the complaint, but supported and justified it, and was not a departure in pleading.
—Johnson v. Fehsefeldt, 118.

Where the reply consists of new matter to meet defensive allegations of the answer, it cannot be construed as a departure from the complaint, unless the facts stated in the complaint are contradicted, and a new basis of relief is substituted for the complaint.
—Johnson v. Fehsefeldt, 120.

DEMURRER.

A demurrer, as a general rule, searches the record, and judgment will be given against the party whose pleading was first defective in substance.
—Downer v. Union Land Company of St. Paul, 413.

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POWER OF ATTORNEY.

If the language of a power of attorney is ambiguous and the conveyance made under it is not one which the grantors intended to authorize, no title passes. The purchaser takes a conveyance at his peril.

—Roy v. Harrison Iron Mining Co., 147.

PRINCIPAL AND AGENT.

An agent for another in transacting his business cannot receive compensation from a third person with whom he is dealing in behalf of his principal.

—Steinmueller v. Williams, 92.

Plaintiff was employed as agent for defendant at its elevator in the village of Barry, and his duty was to purchase grain, store it in the elevator, and ship it out in car lots, upon the order of defendant. He brought this action to recover the sum paid by him to cover shortage claimed to have been fraudulently represented to exist by appellant.

Held: The contract was that plaintiff should inspect and weigh the grain, make the necessary dockage for dirt or foreign matter, and issue tickets for the net amount of grain received. Plaintiff was held responsible for the gross weight at the terminal points of shipment, and, in estimating whether or not there was a shortage in any particular kind of grain between the gross amounts at the elevator and at the terminal points, plaintiff was entitled to a credit for overages in any other kind of grain received and shipped.

—McBrady v. Monarch Elevator Co., 104.

PUBLIC LAND.

The plaintiff, a qualified homesteader, on August 15, 1900, made settlement and entry on certain land under the United States homestead laws, which the notes of the survey thereof showed was swamp. With his entry application he filed a statement, sworn to by him and two witnesses, that the land was not swamp. The local land officers appointed December 11, 1900, for a hearing of the contest; but no notice was given to him of the hearing, nor did he have any knowledge thereof. The contest was dismissed for the alleged reason that he did not appear and prosecute the contest. His homestead entry was afterwards canceled, and the land, which was never swamp, was thereafter certified to the state and deeded by it to the appellant May 3, 1904. The plaintiff went into actual possession of the land September 13, 1900, as his homestead, made permanent improvements thereon, and duly and in good faith performed or tendered performance of all acts which were essential to complete his title to the land, and was prevented from securing the legal title only by the mistake and inadvertence of the

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PUBLIC LAND—Continued.

land department. The appellant had notice of the rights and equities of the plaintiff when it received its deed for the land. The trial court found such facts, and as a conclusion of law that the plaintiff was the equitable owner of the land, the naked legal title to which was held by the appellant in trust for him. *Held*, that the findings of fact are sustained by the evidence, and that the conclusion of law is correct.

—Hivanen v. Duluth & Iron Range Railroad Co., 282.

Where it was impracticable to produce witnesses who saw the land prior to the grant of swamp lands to the state of Minnesota in 1860, to prove that the land was not swamp land at that time, evidence tending to show the character of the land, its fitness for cultivation and its topography fully justified the finding of the trial court that it was not swamp land at the time of the grant.

—Hivanen v. Duluth & Iron Range Railroad Co., 286.

If the land in question was not swamp land, within the definition of swamp land in the grant to the state, then title thereto never passed to the state and the land was subject to settlement and entry by a homesteader. But whether the land was or was not swamp, and the adjustment of the grant were matters within the jurisdiction of the general land office, to be determined in accordance with the procedure in force at the time of the settlement and entry.

—Hivanen v. Duluth & Iron Range Railroad Co., 287.

Under the rules and procedure of the general land office, in force in 1900, a person making a homestead entry and settlement upon land which was designated as swamp land in the notes of survey thereof, is entitled to notice of the time for hearing of contest thereover, and failure to give such notice is not remedied by subsequent notice of the dismissal of the contest.

—Hivanen v. Duluth & Iron Range Railroad Co., 289.

QUO WARRANTO.

An information in the nature of quo warranto, as respects procedure, is governed by the common law, as modified by statute 9 Anne, c. 20, and our own statutes.

—State ex rel. v. Village of Dover, 457.

RAILWAY.

A "low bridge" is a bridge so low as to prevent those engaged upon box cars in the freight service of a railroad from passing under the same in a standing position.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 174.

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RAILWAY—Continued.

"Telltale signals" are straps of leather attached to a wire extended a proper distance above a railroad track to warn persons on box cars of the nearness of a low bridge.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 175.

EMINENT DOMAIN.

A deed conveying to a railway company a strip of land across a farm in terms released all claims for damages to the balance of the land occasioned by locating and constructing a railway over the strip conveyed. The railway company thereby acquired the right to make a solid fill beneath its tracks, and any resulting damages to the remainder of the farm through the loss of view from one side of the track to the other was released. Such damages, therefore, cannot be assessed in a subsequent condemnation proceeding instituted by the railway company to acquire additional width of right of way for slopes for such fill.

—Chicago, Milwaukee & St. Paul Railway Co. v. Rehnke, 390.

RIGHT OF WAY IN CITY OR VILLAGE STREET.

A railway company organized under title 1, c. 34, G. S. 1866, whether organized before or since 1893, is not authorized by the laws of this state, special reference being had to R. L. 1905, §§ 2841 and 2916, to acquire by condemnation proceedings the public easement in any portion of a street within a city or village to construct, maintain, or operate a railway of any kind along such street. A franchise must first be obtained from the city or village before such railway company can acquire such right to construct, maintain, or operate a railway along a street therein. Laws 1893, p. 189, c. 74.

—Duluth Terminal Railway Co. v. City of Duluth, 459.

INJURY AT HIGHWAY CROSSING.

Action to recover damages for injuries sustained by a child three and one-half years old by reason of the alleged negligence of the defendant in backing its car over a public highway crossing, whereby she was hit. The allegations of the complaint considered, and *held*, that they state a cause of action.

—Urbas v. Duluth, Missabe & Northern Railway Co., 309.

Plaintiff was injured in a public street at a railroad crossing. The complaint alleged that defendant negligently moved its cars across the street without any signal or warning light, without lowering the gates and at an excessive speed. The answer was, in effect, a general denial. *Held:*

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RAILWAY—Continued.

1. The question of the identity of the train, whether it belonged to defendant or to one of the three other companies using its tracks, was one of fact for the jury.
2. The questions of negligence in the operation of the train and contributory negligence on the part of plaintiff were for the jury.
3. The court did not err in denying judgment in favor of defendant, notwithstanding the verdict.

—Cawley v. Great Northern Railway Co., 489.

Plaintiff, a resident of New York, was injured by a collision between an automobile in which she was riding and defendant's train at a public crossing in Minnesota. The jury found for plaintiff. It is *held:*

1. Section 5001, R. L. 1905, imposes on a railroad company the duty of causing a bell to be rung or a whistle to be blown at least eighty rods from a public crossing. Hohl v. Chicago, M. & St. P. Ry. Co., 61 Minn. 321, 63 N. W. 742, followed.
2. The court did not err in denying defendant's motion for a directed verdict.

—Libaire v. Minneapolis & St. Louis Railroad Co., 517.

SERVICE OF PROCESS.

Several foreign railway corporations, having no lines in this state, adopted the name "Blue Ridge Despatch," and under that name established an agency in the city of Minneapolis, and appointed an agent, with authority to solicit business for shipment over their lines. In pursuance of such authority, the agent received money from shippers, in payment for transporting goods over its lines, issued export bills of lading, and designated the point of delivery to the initial carrier in Minneapolis. In an action to recover damages, brought by a shipper whose goods were received by the Blue Ridge Despatch at Minneapolis for through shipment, *held:*

Service of process upon the agent at Minneapolis was service upon the constituent railroad corporations. North Wisconsin Cattle Co. v. Oregon Short Line R. Co., 105 Minn. 198, 117 N. W. 391, distinguished.

—Archer-Daniels Linseed Co. v. Blue Ridge Despatch, 367.

REFORMATION OF INSTRUMENT.

A contract entered into under mistake of one of the parties as to its legal effect, coupled with inequitable conduct on the part of the other contracting party, may be reformed in equity.

—American Fruit Product Co. v. Barrett & Barrett, 22.

But the rule does not apply to a written contract, couched in plain and unambiguous language, concerning which and the legal effect whereof

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REFORMATION OF INSTRUMENT—Continued.

there can be no question, which is signed and executed with full knowledge of its various terms and provisions.

—American Fruit Product Co. v. Barrett & Barrett, 22.

A written contract for the sale of goods provided that orders therefor should be made before a date specifically named. *Held*, that a contemporaneous oral agreement that orders would be received and filled, if made subsequent to the date so named, cannot be incorporated in the contract, within the rule stated, on the theory of reformation; no fraud or deception being shown.

—American Fruit Product Co. v. Barrett & Barrett, 22.

Inequitable conduct, as applied to cases of this character, consists in doing acts, or omitting things, or the making of representations, tending naturally to deceive as to the true interpretation of the contract, which the court finds to be unconscionable.

—American Fruit Product Co. v. Barrett & Barrett, 27.

REWARD.

The train of a railway company was held up and robbed. It offered a reward of $5,000 for the arrest and conviction of each robber. One of them was arrested, convicted, and sentenced to life imprisonment. There being several claimants for the reward, there was an interpleader, and the amount of the reward deposited in court. The appellants M. and D. were by the court's findings of fact and conclusions of law denied any share in the fund. *Held:*

1. A person having knowledge of a reward for the arrest and conviction of a criminal, whose arrest is not one of his official or contractual duties, who renders services which materially and proximately aid in the arrest and conviction, is entitled to an equitable and relative share of reward, where the amount thereof is in court upon interpleader.
2. Upon the facts stated in the opinion, M. was, and D. was not, entitled to share in such fund.

—Forsythe v. Murnane, 181.

SALE.

Rule that an acceptance of an order for the purchase of goods, specifying terms different from those named in the order, is in legal effect a rejection of the order, applied where an order for campaign goods specified they were to be shipped at once, and the letter of acceptance named November 1, "or as soon thereafter as possible."

—Bastian Bros. Co. v. Wemott-Howard Co., 196.

Where an order is accepted upon terms different from those specified in the order, and the buyer at once telegraphs the seller canceling the

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SALE—Continued.

order, the intending purchaser is not liable for the price of the goods, even if they are subsequently delivered.

—Bastian Bros. Co. v. Wemott-Howard Co., 196.

Action to recover upon a written contract for goods sold and delivered. Defense, that the parties made an oral contract pertaining to an advertising offer, and then a printed instrument was presented, which defendant was induced by plaintiff's fraud to sign. *Held:*

1. As between the original parties to a written instrument, a party whose signature thereto is obtained by fraud may avoid it, although he was lacking in ordinary business prudence in the premises.
2. The verdict for the defendant is sustained by the evidence.
3. The trial judge did not abuse his discretion in denying a new trial on the ground of the misconduct of defendant's counsel.

—Providence Jewelry Co. v. Crowe, 209.

The defendant gave a written order for a steering pole to be attached to a threshing separator for the purpose of steering and drawing it. The order contained express warranties, but provided that a failure to give a note for the purchase price of the pole before it was delivered should discharge the plaintiff from all warranties. The pole was delivered, but the note was neither given nor demanded by the plaintiff before delivery. *Held* that, in an action for the purchase price of the pole, the defendant was entitled to show a breach of the warranty implied by law that it was fit for the purpose intended.

—Hansmann v. Pollard, 429.

A warranty of a chattel is a matter of contract, expressed or implied, and the seller may attach such conditions or limitations to the express warranty as he sees fit. An express warranty will exclude an implied warranty on the same subject. Where a chattel is intended and ordered for a particular use or purpose, the general rule is that there is an implied warranty that it shall be fit for the purpose intended. Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359.

—Hansmann v. Pollard, 432.

Where an order, as to the conditions and warranties, is printed matter prepared by the seller and is unfair toward the buyer, the contract, as to the warranties and conditions upon which they are to be effective, will be construed strictly against the seller.

—Hansmann v. Pollard, 432.

Query: Whether an order, which provides that if the buyer fails to pay for the machine or chattel ordered, or give his promissory note therefor, before delivery, the seller shall be discharged from all warranties contained in the order, is valid and enforceable?

—Hansmann v. Pollard, 433.

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SET-OFF AND COUNTERCLAIM.

A claim against an individual member of a firm cannot be offset against a debt due such firm. But an answer alleging that defendants became sureties upon a bond upon the representation of a member of the firm, now bringing suit, that he held as security sufficient property to meet any liability upon the bond, and that he would save defendants harmless from any liability thereunder, states an equitable defense, which under the circumstances of this action, may be pleaded and shown.

—Noyes v. Ostrom, 111.

STATUTE.

A change in the language or phraseology of statutes in a general revision thereof does not necessarily indicate an intention on the part of the legislature to depart from or to modify, in point of substance, the previously existing law. Such change is ordinarily to be ascribed to a purpose to condense and simplify the statute.

—United States & Canada Land Co. v. Sullivan, 27.

It is well settled that statutes creating obligations, where otherwise none exist, or those imposing new duties, should, if valid at all, be strictly construed, and treated as embracing such matters and situations only as come clearly within the scope and purpose of the legislation.

—Town of Farley v. Town of Boxville, 206.

State v. District Court of Hennepin County, 107 Minn. 437, 120 N. W. 894, to the effect that where two inconsistent statutes, relating to the same subject-matter, are both incorporated into a general revision, the court will, in construing them, inquire as to the date of the respective enactments, and give effect to the latest expression of the legislature, followed and applied.

—State ex rel. v. District Court of Red Lake County, 298.

The Wisconsin act of 1907, c. 254, and the federal employer's liability act [35 St. 65, c. 149] are essentially different in some substantial respects, which are stated in the opinion.

—Creteau v. Chicago & Northwestern Railway Co., 421.

Section 1 of title 1 of chapter 34, G. S. 1866, as amended by Laws 1893, p. 189, c. 74, and section 29 of title 1, relating to the right of corporations to condemn a right of way upon a public street, were carried forward into the Revision of 1905 under a different arrangement of and subdivision into sections. But by such rearrangement no alteration was apparently intended, and none was therefore made in the existing law.

—Duluth Terminal Railway Co. v. City of Duluth, 459.

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STREET RAILWAY.

Plaintiff, driving in a wagon, parallel with a street car track, undertook to cross in front of a car approaching in the same direction in which he was going. It is *held* that the trial court properly refused to apply the doctrine of wilful negligence in the collision which then occurred, and there was evidence to sustain the verdict in favor of defendant.
—Bloomquist v. Minneapolis Street Railway Co., 12.

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STREET RAILWAY—Continued.

Plaintiff, while riding on an auto truck guided by his employer, was injured by a collision between it and a street car, and brought an action against his employer and the street car company. *Held:* That if there was negligence in the operation and control of the car and in the management of the truck, plaintiff may recover against both defendants. As to plaintiff both may be liable on the doctrine of concurrent negligence, though in a controversy between themselves one defendant might be exonerated because of the contributory negligence of the other.

—Coleman v. Minneapolis Street Railway Co., 366.

TAXATION.

Our statutes provide that in assessing any tract or lot of real property, the value of all structures and improvements thereon must be determined separately; but for the purpose of taxation the structures and improvements are considered a part of the realty, and are assessed as such.

—La Paul v. Heywood, 376.

TOWN.

The board of county commissioners has no authority, in the absence of legislative grant of power, to extend the boundaries of a town organized by it beyond the boundary line of the county.

—Town of Farley v. Town of Boxville, 203.

Power to so extend the boundary is not granted by section 3, art. 11, of the state constitution, nor by section 914, G. S. 1894.

—Town of Farley v. Town of Boxville, 203.

When a congressional township, divided by county lines, is organized by the board of commissioners of one of the counties in which the township is in part situated, the territory beyond the county line does not become a part of the town. As to that territory, the organization is unauthorized and of no effect.

—Town of Farley v. Town of Boxville, 203.

A congressional township was partly in Polk county and partly outside that county. The part outside the county was not in any county. The county commissioners of Polk county organized the township into plaintiff town, including that part outside the county. In 1883 the part not in Polk county was included within Marshall county. Subsequently the territory annexed to the county of Marshall was organized as defendant town and in 1891 a part of it was incorporated in the city of Warren. Before annexation to Marshall county, plaintiff town issued its bonds for $5,000. After plaintiff had paid the bonds, it brought this action to have defendant town pay its proportionate share. The case was dismissed. *Held:* Laws 1907, p. 368, c. 273 (R. L. Supp. 1909, §§ 787–1,

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TOWN—Continued.

787–2) and Laws 1909, p. 614, c. 492 (R. L. Supp. 1909, §§ 691–2, 691–3) had no application, and the trial court did not err in dismissing the action.

—Town of Farley v. Town of Boxville, 203.

TRIAL.

Permitting experiments in the presence of the jury rests in the sound discretion of the trial court.

—Brown v. Douglas Lumber Co., 67.

CHARGE TO JURY.

Any verbal inaccuracy in a charge likely to mislead a jury should be called to the attention of the court before the jury retires. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

—Bloomquist v. Minneapolis Street Railway Co., 16.

When the trial court in its discretion directs the jury, in addition to the general verdict, to answer specific questions, the jurors are not at liberty to disregard such direction. They should be required either to answer the questions or to give some good reason for their inability to do so.

—Brown v. Douglas Lumber Co., 67.

An action for personal injuries, predicated wholly and entirely upon the statutes of the state of Wisconsin abolishing the fellow servant doctrine as respects railroad employment, and tried throughout upon the theory of liability thereunder, *held* erroneously submitted to the jury upon the question whether defendant was liable under the federal employer's liability act. 35 Stat. 65, c. 149.

—Creteau v. Chicago & Northwestern Railway Co., 418.

Defendant was not estopped from raising the point by objecting to the introduction in evidence of the Wisconsin statute and urging in support of its motion for a directed verdict, that the state law had been superseded by the federal employer's liability act.

—Creteau v. Chicago & Northwestern Railway Co., 420.

In a personal injury action the court did not err in refusing to admonish the jury that an indemnity insurance company is entitled to the same consideration in courts of justice that is accorded to individuals.

—Woxland v. Northwestern Consolidated Milling Co., 446.

TROVER AND CONVERSION.

Where possession of real estate is unlawfully or fraudulently obtained, and trees or soil severed from the premises and converted by the tenant, the title remains in the owner of the premises, and he may recover its value as enhanced by the labor of the wrongdoer.

—Evans v. Kahn, 45.

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TROVER AND CONVERSION—Continued.

In this, a statutory action of waste, the evidence did not show the damages to the premises, but the allegations of the complaint, taken in connection with the testimony received without objection, justified an assessment of damages based upon the enhanced value of the property converted, not, however, for the amount awarded.

—Evans v. Kohn, 45.

VENDOR AND PURCHASER.

Plaintiffs executed in blank an executory contract of sale of their land in which defendant company, which had been acting as agent in selling the land, inserted its own name as purchaser and then sold the land to a third person. Defendant made a payment to plaintiffs on account of the down payment. Thereafter, upon default judgment against plaintiffs in favor of another person, execution was issued and the interest of plaintiffs in the land levied upon and sold in due course. There was no redemption from the sale, and, after the expiration of the time to redeem, the interest of the purchaser was conveyed to defendant. In an action for the reinstatement of the sale contract and a decree that defendant held whatever title it acquired under the execution sale as trustee of plaintiffs, *held:* The evidence sustained the findings of the trial court that (1) the settlement of the amount due on the down payment was not final or conclusive, and (2) the defendant was not entitled to a commission for making a sale of the land. Its right to a commission was clearly merged in the executory contract, by which the relation of the parties was entirely changed.

—Christianson v. Mille Lacs Land & Loan Co., 120.

In an action to recover damages for the breach of an executory contract for the sale of land, it is *held* that the evidence is sufficient to sustain the verdict of the jury to the effect that defendant unconditionally repudiated the contract, and refused to perform the same, and that the damages awarded are not excessive.

—Western Land Securities Co. v. Daniels-Jones Co., 317.

The owners, as vendors, by entering into a contract of sale containing a provision that no damages should be recoverable "if the owner refuses to accept sale," accept sale within the meaning of the contract, and are liable for damages for a breach of the contract.

—Western Land Securities Co. v. Daniels-Jones Co., 319.

The complaint charged a repudiation of the contract in two respects only, a conveyance to K., and the refusal of a tender. Incompetent evidence of a subsequent conveyance to W., received without objection on the trial, and submitted to the jury, was sufficient to prove the fact.

—Western Land Securities Co. v. Daniels-Jones Co., 320.

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VENDOR AND PURCHASER—Continued.

The fact that plaintiff's tender did not include the full amount of interest to which defendant was entitled would not defeat the right of action, where the tender was refused, not on the ground that it was insufficient but upon the ground that the contract was not then in force.

—Western Land Securities Co. v. Daniels-Jones Co., 321.

VENUE.

Action by a homesteader in possession of his claim for injury to crops resulting from negligence in operation of defendant's dam. Motion by defendant, after jury was impaneled, for change of place of trial under Laws 1909, p. 115, c. 126, § 1, because the trial involved title to real property, was denied. *Held:* The trial involved no controversy as to the title of real estate, and the denial of the motion was not reversible error.

—Thompson v. St. Louis River Dam & Improvement Co., 427.

VILLAGE.

See Municipal Corporation, 452.

WASTE.

In an action for waste under section 4447, R. L. 1905, in which treble damages may be allowed, the proper basis for damages is the depreciation in the value of the premises.

—Evans v. Kohn, 45.

WATER AND WATERCOURSE.

Action by a lower riparian owner for damages caused by the destruction of his milldam by the breaking of the dam of an upper owner. Defendant's demurrer to the complaint was overruled. *Held:* The maxim res ipsa loquitur applies to the facts alleged in the complaint, but it is a rule of evidence, not of pleading, and it cannot supply an allegation of an essential ultimate fact. A general allegation of negligence in respect to the construction and maintenance of the dam would be sufficient.

—City Water Power Co. v. City of Fergus Falls, 33.

Action to restrain the town authorities of White Bear from removing a fence erected by the plaintiff across a public highway, leading from Edgerton street to Vadnais Lake, a meandered body of water, from which St. Paul derives a portion of its water supply. The fence was erected to prevent access to and the pollution of the waters of the lake. The maintenance of the fence will better enable the plaintiff to prevent the pollution of the waters, and it may be maintained for that purpose under proper conditions without material prejudice to the defendants or the public. The plaintiff has never, by condemnation proceedings or otherwise, acquired any rights in the highway as against the public. The trial

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WATER AND WATERCOURSE—Continued.

court directed judgment permanently restraining the defendants from removing the fence, provided a gate be maintained therein.

Held, that the plaintiff is authorized to acquire, by condemnation proceedings, such limited use and control of public highways, subject to proper conditions, as the court in which the proceedings are pending may find to be necessary for the protection of the water supply of the city. After such right has been lawfully acquired, a court of equity has power to protect the plaintiff in the exercise of the right; but it has no power to create it in the first instance. The court erred in directing a permanent injunction to issue.

—Board of Water Commissioners v. Belland, 292.

Action by a homesteader in possession of his claim to recover damages for loss of his crops thereon, alleged to have been caused by the negligence of the defendant in maintaining, operating, and supervising its dam in the river, whereby its waters were cast upon the land in destructive quantities. Verdict for plaintiff. *Held*, that the trial court did not err in receiving evidence of plaintiff as to the time and labor expended in clearing the land of the débris brought on it by the water in preparation for the next year's crops, nor in its charge, and, further, that the verdict is sustained by the evidence.

—Thompson v. St. Louis River Dam & Improvement Co., 425.

WILL.

The evidence justified the jury in finding that Mary Kletschka was of unsound mind and incapable of executing a will on February 17, 1907, and that she was unduly influenced to execute a will which devised property of the value of $35,000 to five daughters and one son, but excluded her son, Emanuel Kletschka, the contestant.

—Kletschka v. Kletschka, 228.

WITNESS.

Where part of a conversation is called out on cross-examination of a witness, the other side was entitled to the whole conversation on his redirect examination.

—Brown v. Douglas Lumber Co., 74.

The extent to which witnesses may be examined or cross-examined upon the subject of the value of property having no fixed market price rests in the discretion of the trial court.

—McKinley v. Macbeth, 148.

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WORDS AND PHRASES.

In an accident policy, the word "accident" means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident.

—Ludwig v. Preferred Accident Insurance Co., 513.

"Gopher holing," so-called, is accomplished by drilling a hole horizontally into a bank, charging it with dynamite or powder, attaching a fuse and exploding the charge.

—Spino v. Butler Brothers, 326.

The term "low bridge" means one so low a person on a box car cannot pass under it in a standing position.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 174.

"Mutual mistake" consists in a clear showing of a misunderstanding, reciprocal and common to both parties, in respect to the terms and subject-matter of the contract, or some substantial part thereof.

—C. H. Young Co. v. Springer, 386.

The term "telltale signals" describes straps of leather attached to a wire above a railway track to warn persons on box cars of the nearness of a low bridge.

—Koller v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 175.

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